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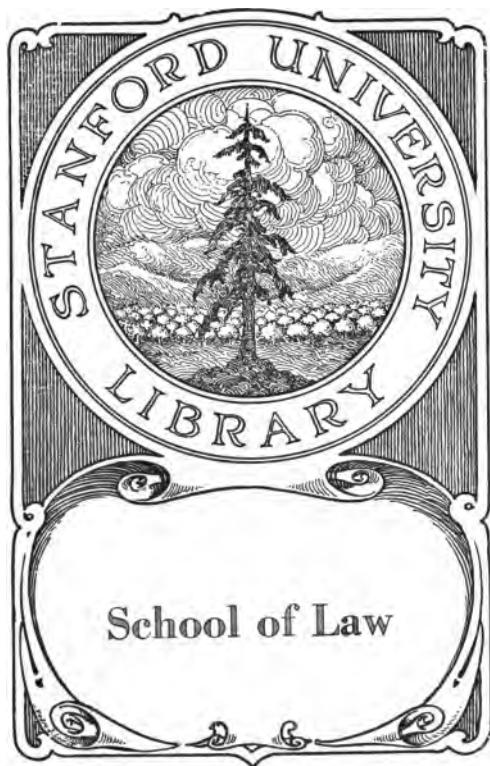
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**AN INTRODUCTION**  
**TO**  
**HINDU AND MAHOMMEDAN LAW**  
**FOR THE USE OF STUDENTS**

**BY**  
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## PREFACE

THE following pages are substantially a reprint by special permission of *The Times* of two articles which appeared in the *Encyclopaedia Britannica*, vol. xxix. pp. 276-285, and vol. xxi. pp. 469-474.

There are many persons who though they have no intention to become lawyers are nevertheless required, in order to prepare themselves for the performance of their duties in India, to obtain a general knowledge of the Hindu and Mahomedan Law. These persons have not always the time at their disposal which would enable them to study the excellent, but much more elaborate, commentaries which have appeared on these subjects, and perhaps to persons so situated these two short treatises may be useful.

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## GENERAL INTRODUCTION

BEFORE entering upon the consideration of the Hindu and Mahommedan law it is desirable that I should explain briefly how it was that we came to administer these two bodies of law, and to what extent we do so.

For this purpose it is necessary to give a short account of the different kinds of law which prevail in India, and how they became established, for the history of each one is so closely connected with the others that they can hardly be separated.

There are in India four prevailing systems of law : English law (i.e. law made in England and applied in India), Anglo-Indian law (i.e. law made in India by the British Government), Hindu law, and Mahommedan law.

The English law prevailing in India is partly made by Parliament in England expressly for India. But there was at one time a good deal of English law applicable in India which was not made by Parliament for India, and there is still some of this law in force in India. How this law came to be applicable to India I shall explain presently.

The Anglo-Indian law is made by the Legislative Councils in India under the authority of Acts of Parliament which have established these Councils. There are seven such Councils in India. They are the Council of the Governor-General, and the several Councils of Bengal, Bombay, Madras, the United Provinces, and the Punjab.<sup>1</sup>

Both the English law and the Anglo-Indian law are,

<sup>1</sup> I have not in this Introduction made any allusion to Burma.

generally speaking, territorial. That is to say, they are binding generally on all persons whatsoever in the districts to which they apply. Thus the Governor-General's Council legislates for the whole of India, and the laws which that Council makes are applicable generally to all persons in India. The Legislative Council of Bengal legislates for Bengal only, and the laws which that Council makes are applicable generally to all persons in Bengal, and so on.

A very large portion of the field of law has been covered by the activity of the Indian Legislatures. The criminal law, the law of contract, the law of evidence, the law of landlord and tenant, and other important topics of law have been provided for by Anglo-Indian law.

There are, however, some important topics which remain untouched by the Legislature. We still administer considerable portions of Hindu and Mahommedan law almost absolutely free from any legislative innovation. True it is, that the field of subjects covered by these two systems of law (it is the same in both) is of small extent reckoned by the number of topics which it embraces, but it is nevertheless seen to be of the highest importance when the nature of these topics is considered. All the relations of family life, marriage, succession to property, guardianship, the ownership and enjoyment of the family home, religious questions so far as they can be entertained by courts of law—all these are governed by rules derived from the Hindu law for Hindus, and from the Mahommedan law for Mahommedans.

The Hindu law and the Mahommedan law are both personal. That is to say, they do not apply to all the persons in a given district like territorial laws, but only to those persons who answer a given description. The Hindu law applies to every one in British India who is a Hindu, and to no one else. To be a Hindu is partly

a matter of religion and partly of descent. If a Hindu drops his religion he ceases to be bound by the Hindu law.<sup>1</sup>

The Mahommedan law applies to every one in India who is a Mahommedan, and to no one else. To be a Mahommedan is to profess the Mahommedan religion. If a Mahommedan drops his religion he ceases to be bound by the Mahommedan law.<sup>2</sup>

I will now endeavour to explain how the legal system at present in India was arrived at, for without this explanation our position with regard to the Hindu and Mahommedan law can hardly be understood.

The whole course of Indian history, more especially the history of law, has been affected by the fact that originally we did not go to India to conquer the country, but only to trade. We went there, originally, as many other nations did, to buy and to sell, and we only desired to make such arrangements as were necessary for carrying on this trade. For this purpose nothing more was actually necessary than harbours for our ships, and places on land, conveniently situated, for storing the goods in which we wished to traffic. Nothing would have been simpler than to make such arrangements had we been dealing with any European people. No cession of terri-

<sup>1</sup> A very difficult question arises when a Hindu gives up his religion, and it becomes necessary to determine by what law he is governed in regard to those matters for which no territorial law is applicable. It has been considered that he may either continue to live under the Hindu law or adopt the English law. There is some analogy to this in the well-known *liberum arbitrium* under the later Roman Empire.

<sup>2</sup> There are many natives of India—Armenians, Parsees, Sikhs, Jains, Buddhists, and others, who are neither Hindus nor Mahommedans, though some are nearly connected with Hindus, whilst others are Christians. Where there is evidence that there is a well-established custom, this custom is followed, and to some extent the legal position of these persons has been defined by legislation. See Ilbert, *Government of India*, p. 393.

tory would have been necessary. The harbours of the country would have been open to us, and we could have hired warehouses for our goods, and houses in which to reside, whilst living under the same laws as the inhabitants of the country in which we wished to trade.

It was, however, considered impossible to accept this simple arrangement in India, or in any Eastern country. When we first went to India, and indeed long after, there was a notion that for Christians to live under what they called the laws of 'infidels' (meaning by this all persons who were not Christians) was an abomination not to be endured. In Lord Coke's<sup>1</sup> opinion, these 'infidel' laws were 'not only against Christianity, but against the laws of God and nature as contained in the Decalogue'. And this opinion was maintained down to Lord Stowell's time, though he throws the blame rather on the other side. That renowned judge in the case of the *Indian Chief*<sup>2</sup> delivered his opinion as follows: 'In the western part of the world alien merchants mix in the society of the natives, access and intermixture are permitted, and they become incorporated almost to the full extent. But in the East, from the oldest times, an immiscible character is kept up; foreigners are not admitted into the general body and mass of the nation; they continue strangers and sojourners as their fathers were. *Doris amara suam non intermiscuit undam.*'

It was this feeling of mutual distrust and repugnance which led to the establishment of a peculiar system of intercourse with Eastern nations called the Factory System. This system prevailed in all parts of the East, and I take it to be shortly this—a small portion of territory conveniently situated was granted by the Govern-

<sup>1</sup> See the report of *Calvin's Case* in Coke's Reports, Part vii, p. 1.

<sup>2</sup> See the report of this case in Robertson's Admiralty Reports, vol. iii, p. 29.

ment of the country to the foreigners, where they resided, had their warehouses, and carried on their business. Within these limits the foreigners were not interfered with; and even the natives of the country who took service with them and lived in the factory were under their jurisdiction. The factory never exceeded the size of a town, and sometimes consisted of only a few houses. There were at one time in India many such factories; the English, French, Dutch, Portuguese, and Danes, all having them. They also existed in China and in the Turkish dominions.

There was never any doubt that, when a factory was established by the subjects of the King of England, the King, by virtue of his prerogative, and without any assistance from Parliament, could establish courts of justice there, both civil and criminal, having jurisdiction over all persons whatsoever within the factory: and this power was exercised in numerous cases.

The earlier charters give power to the East India Company to establish courts where they please. But after the reign of Charles II the charters give directions more or less precise as to the nature of the courts and where they are to be established. None of the charters, however, give directions as to the law which is to be administered in these courts: and the only explanation of this silence is that it was taken for granted to be the English law existing at the date of the charter, as nearly as the circumstances of the case would admit.

So long as the action of the officers of the East India Company was confined to the carrying on of the trade of the Company, and to keeping order within the limits of the factories, no serious difficulties arose, and for a long time the relations of the Company to the native rulers was of this simple character. But towards the middle of the eighteenth century there was a great

change of policy. The officers of the Company, instead of keeping aloof as they had hitherto done from the native Governments, began to take an active part in native politics. By an arrangement made between the Company and Mir Jafir after the battle of Plassey in 1757, this person became Subadar or Governor of Bengal, Behar, and Orissa, under the Emperor of Delhi; and in return Mir Jafir promised the English the possession of a considerable tract of country in the neighbourhood of Calcutta, corresponding with the district now known as the Twenty-Four Pergunnahs. This district is, I should say, about as large as Lincolnshire; much too large, therefore, to be called a factory. It does not appear that this arrangement was ever sanctioned by the Emperor; and it scarcely took effect, because in 1760 the Company took upon themselves to depose the author of it, and to substitute one Mir Kasim in his stead; who in return made a grant to the Company of the still more extensive districts of Burdwan, Midnapore, and Chittagong, a territory about as large as Wales. This, however, was a no more lasting arrangement than the preceding one, for it was superseded in 1764 by a grant from the Emperor Shah Alum himself.

This grant was the foundation of our Indian Empire, and it was conceived in a spirit entirely opposed to that to which Lord Coke and Lord Stowell gave expression in the cases to which I have above referred. The Company became the Diwan of the Emperor of Delhi.<sup>1</sup> The officers of the Company, so far from keeping up their 'immiscible character', became, by means of this grant, the servants of the Emperor. So far from treating the laws of the 'infidel' as against the laws of God and

<sup>1</sup> The Diwan in a Mahomedan state is the chief civil officer. His duty is primarily to collect the revenue, but he is also charged with extensive jurisdiction in all civil matters.



nature, it became their duty to administer these 'infidel' laws.

The effect of this grant was practically to place the whole civil administration of Bengal, Behar, and Orissa, including the collection of the revenue, the administration of civil justice, the police, and all the executive administration of those provinces in the hands of the Company as servants of the Emperor. Only the trial of criminal cases was reserved to the Nawab Nazim,<sup>1</sup> the Mahommedan name of the officer whom I have above described by his Hindu designation of Subadar.<sup>2</sup>

Warren Hastings was appointed Governor of Bengal in 1772, and it was not until his arrival at Calcutta that the officers of the Company really undertook the duties which had been imposed upon them by the acceptance of the Diwanny. He drew up (probably with the assistance of the Supreme Court) a scheme for the administration of justice.<sup>3</sup> Acting, as he then was, as the servant of the Mogul Emperor, it was impossible for him to maintain the immiscibility of Christians and infidels, or the profanity of infidel laws. Nor had he any such intention. On the contrary, by s. 23 of the Regulations it is expressly provided that, at any rate, 'in all suits regarding inheritance, marriage, caste, and other religious usages and institutions, the laws of the Koran with respect to Mahommedans, and those of the Shasters with respect to Gentoos, shall be invariably adhered to.'<sup>4</sup>

<sup>1</sup> The two courts of appeal from the district courts of the East India Company were called Sudder Diwanny Adawlut, and Sudder Nizamut Adawlut: literally, the principal court of the Diwan, and the principal court of the Nizam. But the real distinction between them was that one dealt with the matters of civil jurisdiction which had been delegated to the Diwan, and the other dealt with the matters of criminal jurisdiction which had been reserved to the Nizam.

<sup>2</sup> See the document in Aitchison's *Treaties*, vol. i, p. 52.

<sup>3</sup> See Colebrooke's *Digest of the Regulations*, vol. iii, p. 1.

<sup>4</sup> By 'Shasters' is meant the Hindu law: see *infra*, p. 13. 'Gentoos'

But the doctrine of immiscibility was not to be given up without a struggle. Just at this time, that is to say in the year 1773, the 13 Geo. III, c. 63 was enacted. Having, I suppose, some vague, confused notion of what was going on in India, and wishing to turn it to the profit of the nation, Parliament in this Act put forward in a hesitating and indistinct manner a claim of sovereignty on behalf of the British Crown over the whole of Bengal, Behar, and Orissa. Of course there was not at that time a shadow of legal justification for such a claim. The grant of the Diwanny, so far from giving colour to any such claim, was in itself a clear assertion, as its acceptance by the Company was an unequivocal acknowledgement, of the sovereignty of the Mogul Emperor. Nor was it probably intended by the English Government to make any active assertion of its claims. But the judges of the new Supreme Court, which was established by the Act of George III and by the charter of the following year, were able to found upon the vague expressions of these two documents a plausible claim to a vast extension of their own powers. They were able to assert that Parliament had intended to give them a general jurisdiction, superior to that of the Company's courts, over all Bengal, Behar, and Orissa. And had the Supreme Court been able successfully to assert this jurisdiction, and had they exercised it (as I have little doubt they would have done) in the spirit of *Calvin's Case* and of the *Indian Chief*, they would have placed themselves entirely upon the standpoint of English law. Fortunately this was prevented by the British Parliament itself. The extreme doctrine of *Calvin's Case* had, perhaps, by this time no very deep root in the nation, and Parliament, at any rate, did not hesitate to cast it

was the name given by us, at first, to the Hindus. It is supposed to be of Portuguese origin.

aside. By an Act passed in the year 1781 (21 Geo. III, c. 70), the jurisdiction of the Supreme Court was strictly confined to the town of Calcutta, thus preventing that court from interfering in any way with the courts established by the East India Company. And even in Calcutta itself it directed (almost in the words of Warren Hastings) that 'the inheritance and succession to lands, rents and goods, and all matters of contract between party and party, shall be determined in the case of Mahommedans by the laws and usages of Mahommedans, and in the case of Gentoos by the laws and usages of Gentoos'.

It will be observed that neither Warren Hastings nor the English Parliament says anything whatever as to what was the law to be administered either in Calcutta or elsewhere on other subjects than those specified. In consequence of the extensive legislation before alluded to, the question is not now of great importance. But, as a matter of fact, the courts in India have, no doubt, frequently fallen back upon the English law, and in the Supreme Court this would seem to be entirely in accordance with principle. In the courts of the East India Company the principle is not so clear, but it was no doubt a convenient way of meeting legal difficulties.<sup>1</sup>

The restriction, however, laid down by Parliament and by the Regulations has never been infringed upon; scarcely even by the Legislature, although, of course, the legislative power was unaffected by those provisions.<sup>2</sup> The sovereignty of Bengal, Behar, and Orissa soon fell

<sup>1</sup> It must be remembered that in that court and in the courts which preceded it, the English law had always been the *lex fori* (*supra*, p. 5), and all that the Act of Geo. III did was to make a partial change in this respect.

<sup>2</sup> It is very remarkable how rarely the Legislature has ventured to meddle with the Hindu or Mahommedan law, in regard to the topics reserved, and any suggestion of such interference has always been fiercely resented.

from the feeble hands of the Mogul Emperor into those of the servants of the East India Company, or to speak more correctly, it was transferred to the British Crown. New territories have been acquired in India by cession and by conquest. New courts have been established and new charters granted. But throughout the Mahomedan laws and the Hindu laws, to the extent above indicated, have always been carefully preserved.

# **THE HINDU LAW**

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## CHAPTER I

### THE ORIGIN AND DEVELOPMENT OF HINDU LAW

THE Hindu law<sup>1</sup> is in theory of divine origin, and, therefore, fixed and immutable. Ask a Hindu where his law is to be found, and he will answer 'in the Shasters'. The Shasters are certain books supposed to be divinely inspired, and all of great antiquity.<sup>2</sup> They contemplate a state of society very unlike that of the present day, or that of many centuries which have preceded it. It follows that the Shasters, whilst they leave many of the legal requirements of our own time wholly unprovided for, contain many provisions which no Hindu even would now think of enforcing. Consequently the law has had to be frequently changed and supplemented.

There are three agencies by which the law is usually changed in order to meet the growing and changing wants of society. I may call these custom, interpretation, and legislation. But legislation, the most potent and most direct instrument of change, where it is applied, has had scarcely any effect upon Hindu law, at any rate, not upon that portion of it which, as explained above, we reserved to the Hindus. Probably it never occurred to Hindus before we came to the country that laws could be made as they pleased by human legislators. That the legislative authority in India extends to the whole of

<sup>1</sup> From this point, I shall confine the term 'Hindu law' to that part of it which we administer, as explained above.

<sup>2</sup> It is not very easy to obtain anywhere a very clear account of the ancient Hindu law-books. On the whole, I think the best is that in the *Tagore Law Lectures*, 1883, by Professor Jolly. See also Macdonell, *Sanskrit Literature*, p. 428.

Hindu law, and that the Legislative Councils have power to alter that law, there can be no doubt whatever. But they have not done so. It is, therefore, through the agency of custom and interpretation that the Hindu law has been developed.

Custom is a less direct instrument of change than legislation, and it operates more slowly and secretly, but its operation is very extensive, especially in the earlier stages of legal history. Nor, notwithstanding the notion as to the divine origin of Hindu law, can it be said that its operation is otherwise than in accordance with the precepts of the Hindu law itself. Thus we find in the Laws of Manu<sup>1</sup> that it is specially ordered that 'the king who knows the sacred law must inquire into the laws of castes, of districts, of guilds, and of families, and thus settle the peculiar law of each'. And again,<sup>2</sup> 'what may have been practised by the virtuous, by such twice-born men as are devoted to the law, that he shall establish as law, if it be not opposed to the customs of countries, families, and castes'. So far, therefore, there has been no impediment to a gradual modification of the law suitable to the habits of the people. And though the Hindus are on the whole conservative, yet, looking over long periods of time, we can see that under the influence of custom vast changes have taken place which, originating in the habits of the people, have gradually come to be recognized as law, in spite of the oft-repeated injunction that the supremacy of the sacred texts must always be preserved.

Our courts of justice in India in administering the law in India have never shown the least reluctance in enforcing any particular customs wherever they have been adopted. Very important departures from the

<sup>1</sup> Laws of Manu (*Sacred Books of the East*, vol. xxv), Book VIII, v. 41.

<sup>2</sup> Ibid. v. 46.



ordinary law of succession are found in some families, and these, under the name of *koolachar* or family custom, are constantly being recognized.

Interpretation is a somewhat subtle method of development, but one which nevertheless in skilful hands has considerable effect. Without any dishonesty people can very often manage to find in the language of the law words sufficiently vague or comprehensive to cover the sense which they are looking for, especially in dealing with the archaic language of times long past, when it has come to be very doubtful how such language ought to be applied to the changed conditions of modern times. The action of interpretation upon the Hindu law has been somewhat different, according as it took place before or after the British occupation. Before our time for several hundred years vast numbers of commentaries had been written upon particular portions of the Hindu law. All these appealed to the Shasters as the ultimate source of authority. But (as I have said) these commentators incorporated custom very largely, and freely applied the process of interpretation. Naturally they did not all arrive at the same results: and the differences between them have led recent writers to speak of five schools of Hindu law, which have been called, respectively, the Benares School, the Bengal or Gâturiya<sup>1</sup> School, the Bombay School or School of Western India, and the Dravida School or School of Southern India, and the Mithilā<sup>2</sup> School. But it would be a great mistake to suppose that the differences between these (so-called) schools are comparable in importance. As will appear presently when I come to deal with the authorities, it gives a better idea of the true state of the case to say

<sup>1</sup> So called from Gaur, the capital of the ancient kingdom of Bengal.

<sup>2</sup> The district of Mithilā is a small one, bounded on the north by Nepaul, on the south by the Ganges, on the east by the Kosi, and on the west by the Gunduck.

that there are two great schools of Hindu law—that of Benares and that of Bengal.

Since the British occupation of the country the action of the courts of justice has had a considerable effect upon Hindu law. Courts of law are always more or less under the influence of custom, and it is impossible to interpret the law without modifying it. Moreover, opinions of judges on the law are recorded in India, as in England, and the authority which is attached to these opinions renders those modifications permanent. The changes thus introduced are slow and are sometimes wanting in elegance, but they are for the most part salutary. They are also likely to be much improved by the presence of learned Hindus upon the judicial bench even in the highest courts.<sup>1</sup>

#### THE WRITTEN SOURCES OF HINDU LAW

The books to which Hindus refer as divinely inspired sources of law are very numerous. Of these, however, only one has produced any serious effect upon modern Hindu law, that which bears the name of Manu; although two others are sometimes referred to, namely, that which bears the name of Nārada (only a fragment); and that which bears the name of Yājñavalkya, which has only been partially translated.

If we examine the Laws of Manu we shall find that only about one-fourth of the book deals with topics such

<sup>1</sup> Under our highly organized system neither custom nor interpretation can operate freely except through the courts of law, and in these courts the influence of the native lawyers who sit there, especially upon questions of Hindu law, is very great. What might be called the natural development of the Hindu law has, perhaps, been somewhat arrested by the influence of the Hindu lawyers themselves. I am inclined to think that they are a little timid about any innovation. I do not see why even some legislation might not be ventured on, provided the initiation and guidance of it were left to the Hindu lawyers—a task for which they are amply capable.

as we should consider legal, the rest being concerned chiefly with matters either purely religious or ceremonial. In the eighth book there is an enumeration of the topics which are to be dealt with in the courts of law. They are as follows :—

1. Non-payment of Debts.
2. Deposit and Pledge.
3. Sale without Ownership.
4. Partnership.
5. Resumption of Gifts.
6. Non-payment of Wages.
7. Non-performance of Agreements.
8. Rescission of Sale and Purchase.
9. Disputes between the Owner of Cattle and his Servants.
10. Disputes regarding Boundaries.
11. Assault.
12. Defamation.
13. Theft.
14. Robbery and Violence.
15. Adultery.
16. Duties of Man and Wife.
17. Partition of Inheritance.<sup>1</sup>
18. Gambling and Betting.<sup>2</sup>

Of these topics 3–8 are very slightly touched on, and on all the topics except 17 and part of 16 the law as here stated is obsolete, and has been replaced not by any form of Hindu law, but by Anglo-Indian law. What is said on the subject of Partition is still of importance, but it occupies only a very small portion (about one-

<sup>1</sup> As far as I can understand, there is no mention in the Laws of Manu of 'inheritance' in the sense of a succession to the rights or duties of another occurring at the other's death: nor was any such succession known to the ancient law of India.

<sup>2</sup> These are the well-known 'Eighteen Titles' of Hindu law which constantly reappear.

fifteenth) of the entire work, and it had been largely departed from, added to, and varied by custom and interpretation before we came to India. It will be observed that marriage does not appear here as one of the rules which the king is to deal with in his law courts. Probably this, as well as the kindred topic of family membership, was kept under the control of the Brahmins.

Very little is known with certainty as to the date of what we call the Laws of Manu. The latest estimate places them (according to the form in which we now possess them) somewhere between B. C. 200 and A. D. 200.<sup>1</sup> Of more interest than the exact date is the state of society which its contents disclose. The purely tribal and nomadic condition had passed away. Society had settled down so as to possess a regular form of government under a king. The people were divided into four great castes, representing religion, war, commerce and agriculture, and servitude. Justice is spoken of as administered by the king himself in person. There was a regular procedure for the recovery of debts and punishment of offences. There are rules relating to the pasture of cattle, trespass by cattle, and the enclosure of cultivated fields. There was considerable wealth in the shape of horses, carriages, clothes, jewels and money.

There is not, as far as I am aware, a single passage in the Laws of Manu which speaks decisively of land in general as the subject of private property. There was no doubt a temporary occupation of it for purposes of tillage, lasting for a longer or shorter period. So too no doubt the homestead and the pasture land immediately adjoining it was private property, but not apparently the open field. This was either pasture land common to all, or

<sup>1</sup> See the Preface to Bühler's Translation in the *Sacred Books of the East*, vol. xxv.

cultivated in turns under village regulations. This is analogous to the development of private ownership of land in other parts of the world. In Teutonic nations it is the *tun* or *zaun*, and in India the *gotra* (terms which signify the enclosure where the cattle are kept, and where their owner resides), over which private rights are first gained.

The Smṛiti<sup>1</sup> of Yājñavalkya was no doubt a work of considerable importance in its day. It shows a somewhat more advanced state of society than the Laws of Manu. The occupier of land had got a firmer hold upon it, and there was even a possibility of transferring land by sale. The date of this Smṛiti has not been fixed otherwise than by the general agreement that it is later than that of Manu.<sup>2</sup>

The Smṛiti of Nārada belongs to a still later period; perhaps it belongs to the fifth or sixth century.<sup>3</sup> It goes very much more into detail than the other two Smṛitis I have mentioned, and the author propounds views in some important cases which are at variance with those of Manu.

#### COMMENTARIES ON HINDU LAW

I now come to the Commentaries, and far more important for practical purposes than any of these older books is the Commentary which passes under the name of the Mitāksharā. The author of it is named Vijnānesvara. His work is a commentary upon the Smṛiti of Yājñavalkya, and it is supposed to have been written in the latter half

<sup>1</sup> Smṛiti is a word applied to various writings of the post-Vedic period. The English equivalent to it given by Bühler is 'tradition' (*S. B. E.*, vol. xxv, p. 31). In the passage of the Laws of Manu which is there translated, Smṛiti is opposed to Sruti, which Bühler translates by 'revelation': and it is expressly said that by 'Sruti' is meant the Veda. The student who desires more information on this subject may consult Professor Macdonell's *Sanskrit Literature*.

<sup>2</sup> Professor Macdonell places the date approximately at A. D. 350.

<sup>3</sup> *Sacred Books of the East*, vol. xxxiii, p. 18.

of the eleventh century. As I have said, only a portion of it has been translated<sup>1</sup>: that portion which (as the author himself states) relates to Partition. Even from this portion it is easy to see that in the interval which had elapsed from the date of the Laws of Manu (an interval, on any calculation, of a thousand years) society had considerably advanced. Nevertheless there is reason to believe that in some respects the author of the *Mitāksharā* was, as compared with other commentators, somewhat retrograde.

The *Mitāksharā* is an important authority all over India. In most parts of India its authority is supreme. But there is one very important exception. In the district which is sometimes called Bengal Proper (from its correspondence with the ancient kingdom of Bengal, of which Gaur was the capital), and which may be roughly described as the valley of the Ganges below Bhagalpur, the prevailing authority is a treatise called the *Dāyabhāga*. Like the translated portion of the *Mitāksharā*, it is, as its name imports, a treatise on Partition. The author of it was Jīmūtavāhana. There does not appear to be any very distinct clue as to the date at which he lived, except that he wrote after the twelfth century and before the sixteenth.<sup>2</sup> From the vigour of his opposition to the doctrines of the *Mitāksharā*, one is inclined to place the two authors as close together in point of time as possible. I shall discuss very fully hereafter the points of difference between these two great commentaries.

In Western India there is a treatise of considerable authority called the *Vyavahāra Mayūkha*. The author

<sup>1</sup> The translation was made by Henry Colebrooke, who also translated the *Dāyabhāga*. The two translations have been published together under the title of *The Law of Inheritance*. It would have been more correct to call the book 'The Law of Partition'.

<sup>2</sup> Jolly, *Tagore Lectures*, p. 22.

of it was a person named Nilakanṭha, who lived in the sixteenth century. It was translated by Borrodaile, and published at Surat in the year 1827. Generally its authority is secondary to that of the Mitāksharā, but in Gujarat its authority is to some extent preferred.<sup>1</sup>

In the South of India the Smṛiti Chandrika is a work of importance. The author of it was Devannabhatta, who lived in the thirteenth century. He generally follows the Mitāksharā, but is fuller on some points.<sup>2</sup> It has been translated by Krishnaswamy Iyer.

In the district of Mithilā a commentary called the Vivada Chintamani is used, but it is not of the same authority as the Mitāksharā. The author of it was Vachaspati Misra, and he is supposed to have lived in the fifteenth century. It has been translated by Prossuno Tagore.

There are two treatises on adoption which have obtained acceptance<sup>3</sup> over the greater part of India. One is called the Dattaka Mimansa, and the other the Dattaka Chandrika. Both are Bengal treatises, the former having been composed in the early part of the seventeenth century, the latter somewhat earlier. They were translated by Mr. Sutherland, and published at Calcutta in 1821.

#### MODERN WRITERS ON HINDU LAW

I will now notice some of the efforts which have been made to arrive at a knowledge of the Hindu law by persons connected with the British administration. Shortly after the establishment of the Supreme Court, a laudable attempt was made to obtain a complete digest of the Hindu law. At the suggestion of Sir

<sup>1</sup> West and Bühler, *Hindoo Law*, vol. i, p. 12.

<sup>2</sup> Jolly, *Tagore Lectures*, p. 20.

<sup>3</sup> Perhaps to some extent owing to an accident. See Jolly, *Tagore Lectures*, p. 22.

William Jones, a learned Pundit, Jaganatha Terkapunchanana, was directed to draw up such a digest. The work produced by the Pundit was written in Sanskrit, and was translated by Mr. Henry Colebrooke, whence it has been generally called, though erroneously, Colebrooke's Digest. In fact, Colebrooke had not a very high opinion of the work, and he is certainly in no way responsible for its contents. Lately there has been some disposition to exalt its authority, especially amongst the Hindus of Bengal, who greatly respect the learning and ability of the author. Colebrooke himself was a very great lawyer as well as a very great scholar. His knowledge of Sanskrit has rarely been surpassed even by modern scholars. He also succeeded in winning the confidence of the learned natives, and so far overcame their scruples as to induce them to impart to him freely all they knew. Moreover, by an assiduous study of native customs, and by constant intercourse with learned Brahmins, he acquired a deeper insight into the spirit of the Hindu law than had, up to that time, been acquired by any European: far deeper, too, than can be acquired by any mere studying of the texts. He was for many years a judge of the Sudder Diwanny Adawlut or principal civil court at Calcutta; and it is to his industry and sagacity that the reputation of that court, and the confidence reposed in it by the natives, are chiefly due.

There were other lawyers of ability connected with the courts in India, but their labours have now become almost useless because they all, including even Colebrooke, had never really comprehended the Hindu system. They thought it was a fanciful system, foreign to everything of which they had any experience before. It was Sir Henry Maine who first indicated some of the points of resemblance between the Hindu family system



and the ancient law of Europe.<sup>1</sup> Since that time the Hindu law has come to be fully understood; and its interest as a study in social history has come to be appreciated. We see in it the germs of numerous modern institutions.

If for a moment we stop here to consider the nature of the task imposed upon the servants of the East India Company when they undertook to administer the Hindu law, one cannot help feeling surprise that they were able to accomplish it with any degree of success. They had, no doubt, the immense advantage that they established regular courts of justice all through the country, whose judges were honest, and whose decrees were rigorously enforced. Of course the judges in far the greater number of these courts were then, as they have been ever since, natives of India. But there has never been any difficulty in finding amongst natives of India able and honest persons to administer justice, and we have always been able to assert with well-founded confidence, that our administration of justice in India has been in the main upright. But there was still the difficulty that Sanskrit, the language of all the law-books, had already long ceased to be one of the spoken languages of India when we came there. With very rare exceptions the judges, even the native judges, were entirely ignorant of it, and the learned Brahmins who had studied it were expressly forbidden by their religion to make it generally known. We were always willing to employ the Hindus themselves in the administration of justice, but the learned Brahmins, or Pundits as they are called, held aloof. An attempt was made to secure their co-operation by appointing a certain number of them to advise the judges of the civil courts upon difficult questions of

<sup>1</sup> Sir Henry Maine's *Ancient Law* is based on lectures delivered in the Middle Temple Hall in the year 1855.

Hindu law. But this plan was not altogether successful, and the practice of making these appointments was abolished in 1864.<sup>1</sup> Recently, however, a school of able native lawyers has grown up in India, who by their judicial decisions and their writings, which are nearly all in English, are already beginning to render the very greatest assistance to the administration of the Hindu law. If the learned natives continue to study the law, and if they will only consent to join with their veneration for the past a due consideration for the wants and aspirations of the present, the great work of developing the Hindu law may be left safely in their hands.<sup>2</sup>

<sup>1</sup> Act xi of 1864.

<sup>2</sup> Admirable works on Hindu law have been recently published, such as Mr. J. D. Mayne's *Hindu Law*, West and Bühler's *Digest of the Hindu Law of Inheritance*, Joyendra Nath Bhattacharya's *Commentary on Hindu Law*, Rajkumar Sarvadhikari's *Principles of the Hindu Law of Inheritance*, and Gooroo Dass Banerjee's *Hindu Law of Marriage and Stridhana*.

## CHAPTER II

### THE JOINT FAMILY

THE all-important topic of modern Hindu law is the joint family. The whole Hindu law of ownership and succession may be said to hang upon this institution. If the conception of it be once mastered together with the kindred conception of the joint estate, the Hindu law becomes an intelligible system. Whereas apart from these conceptions it must always appear as a mere collection of arbitrary rules.<sup>1</sup>

The Hindu joint family is one of those institutions which it is impossible to understand if we study it alone and as it now exists. It is an ancient institution which has been very gradually modified. And it is not, as was once supposed, an isolated institution. It is the particular form which prevails in India of an institution common to all the nations of Europe and most of those of Asia ; and between the Hindu law of the family and the family law of Europe there are many striking and instructive analogies.

The researches which have been recently made in England and upon the continent of Europe into the early history of mankind lead to the conclusion, that the earlier Aryan societies were all based upon consanguinity. The family, in the widest sense of the word, and the nation were one. We need not stop to inquire whether, as Mr. McLennan supposes,<sup>2</sup> some other bond of association had existed previously to this, for he does not seem to

<sup>1</sup> See *supra*, p. 22.

<sup>2</sup> *Studies in Ancient History*, chap. viii.

doubt that if any such bond had existed, it was replaced by consanguinity. The fundamental conception of early society is, as Sir Henry Maine expresses it,<sup>1</sup> 'that all men not united to you in blood are your enemies or your slaves.' The history of social institutions is the history of the methods by which this cruel doctrine has been effaced.

The idea of consanguinity may be based upon kinship through the father alone, kinship through the mother alone, or kinship through both. It is at first sight not a little surprising to find that anywhere kinship is traced solely through the mother to the exclusion of the father. But a little consideration renders this intelligible. Wherever the intercourse between the sexes is not kept under restriction, there is no possibility of tracing kinship through the father. On the other hand, kinship through the mother is always traceable, because about the maternity of a child there is no doubt. This prepares us to find, as in fact we frequently do find, in the least civilized tribes, a general system of kinship through females and not through males. This subject is fully discussed by Mr. McLennan in the eighth chapter of his *Studies in Ancient History*, and it is particularly interesting to those who are likely to spend any part of their life in India ; because in India we are surrounded with survivals of this early stage of society. For example, amongst the Nairs, a tribe still found in considerable numbers upon the coast of Malabar, and who are British subjects, it is a recognized custom that a woman should have several husbands, consequently no Nair pretends to know who is his father, and no Nair man pretends to have any children. The nearest kindred of a man are reckoned to be his mother's children, and his mother's daughter's children, whom he knows to be of the same

<sup>1</sup> *Early Law and Custom*, p. 276.

blood as himself. So, too, the woman who bears the children is the head of the household, and a girl when she becomes a mother, either starts a new household of her own, or remains in her mother's household.<sup>1</sup>

This is the rudest form of polyandry. There is another form, not quite so rude, which prevails in Thibet and in several tribes in the north-east portions of India. There the woman becomes the wife of several brothers. Shocking as this is to our notions, it is, at least, more decent than promiscuous intercourse. The change is also very important as leading the way to the conception of kinship through males. As explained by Mr. McLennan,<sup>2</sup> 'When a girl becomes the wife of several brothers, and of these alone, she no longer remains in her mother's household or establishes a new household of her own, but she passes into another family, associating with the sons of that family as their wife—whilst in her place in her mother's family is introduced another woman, the wife of her brothers. There being a community of blood and interest in her husbands, there is nothing to prevent the appropriation by them of her issue, and accounting them as members of their own family, and not, as heretofore, members of their mother's family.'

This is the highest development of which polyandry is capable: but it leaves us at a point where the next step, which was to efface it, was easy and natural. The eldest of several brothers would generally be the first to marry. If he begot children, as must frequently have been the case, which he knew to be exclusively his own, a definite conception of fatherhood and sonship would arise.

<sup>1</sup> Whether polyandry was ever as general as Mr. McLennan supposes, or whether, as Sir Henry Maine thinks, it is only a debased form of society, is a question into which I need not enter. It is discussed in Sir H. Maine's *Essays on Early Law and Custom*, chap. vii. See also some observations in the *Law Quarterly Review*, vol. viii, p. 314.

<sup>2</sup> p. 153.

Though these were not yet acknowledged as social institutions, the father would naturally be inclined to make a difference between the children he knew to be his own and the other children, and there would be a separate source of affections and interest in those families where this occurred. It is not difficult to believe that the desire for the relation of father and son, when once conceived, should have become powerful enough to extinguish polyandry altogether. But it has gone farther than this. For reasons which it is not easy to discover, wherever we find a people once beginning to trace kinship through males, there also we generally find that for a time it entirely displaces the tracing of kinship through females, and that no account is taken of the connexion by blood with the mother's family. The reason for this is not obvious. There is certainly no difficulty in tracing kinship simultaneously through both parents, and in civilized societies this is now the universal custom. But in early societies after the extinction of polyandry, the family is generally found to consist of the descendants of a common male ancestor, to whom all the members trace their connexion through males alone. The wife when brought into the husband's family is entirely cut off from her own. The daughter, when she marries, is expelled altogether. The family consists of the male members only, to whom their wives and children are mere appendages.

This is what is called the patriarchal form, and we have no difficulty in conceiving a community so organized holding together so long as the common ancestor is alive. His authority would keep the little society together and in order. On his death, however, there arises a difficulty. Take, for example, a patriarch who dies leaving four sons, some of whom have sons, or possibly grandsons. What is to be done in such a case? It would be easy to

form a number of new and independent families, each under the control of its own living progenitor, but this division would expose them to the attacks of their stronger neighbours, and a community conscious of this danger would naturally seek to preserve their union. It was necessary, therefore, to seek some artificial method of preserving the family entire, and this was done by selecting as their new chief that one amongst their number who, by his age and his prowess, seemed best fitted to rule. This is the contrivance which we find most frequently adopted: the obvious person, if he were not disqualified, being the eldest surviving male, but there are also to be found in some countries traces of an election taking place whenever the head of the family died. This was, I believe, the case in some of the highland clans in Scotland.

Such a community, all originally descended from a common ancestor, and ruled by an elected or an hereditary chief, is capable of indefinite extension. The members of it might, therefore, become so numerous as to cause inconvenience to each other, and to call for some expedient for reducing the size of the family. There was, however, no lack of room, and this difficulty could always be easily met by sending out detachments from the larger group.

But in the earliest times it was far more likely that a family should become too small than that it should become too large. War, famine, and pestilence would be constantly at work to reduce its numbers, and in early times a small community would be in constant danger of extinction. Moreover, not only was the danger greater, but the means of avoiding it were not so simple. The difficulty does not present itself to our minds as a very serious one, because we see no difficulty in adopting the simple expedient of a voluntary union between two or more

families. But such a voluntary union for purposes of convenience, between persons of different blood, was in early times beset with difficulties. Men who had no common ancestors could not share in the same sacrifices, how then could they perform together any of the important acts of life in which these sacrifices always formed a part? Numberless objections would seem to render such a union impossible. When at last, under the pressure of necessity, methods were adopted for recruiting artificially the failing numbers of the family, the strange character of the proceeding was concealed by a fiction. It was pretended that a tie of consanguinity existed where it did not. Thus, a childless member of the family, who wanted a son, having found a boy suited to his purpose, pretended to consider himself as the boy's real father. This contrivance, which still survives, and which we call Adoption, is the most direct and simplest way of meeting the difficulty. Moreover, it not only supplies a real want, but satisfies certain natural instincts second only to those of true parental affection. But it was too slow a process for some contingencies, and accordingly we find not only the creation of a fictitious progeny but of fictitious brotherhoods, and fictitious common ancestors. Stories were invented, and in time came to be believed, by which the capricious character of a union between two tribes was concealed, and the new society was represented as really united by the old bond of kinship. In Western India, where some of the older forms of family organization still survive, such stories are said to be current even to this day.<sup>1</sup>

I have hitherto spoken only of the family; using that term in its most general sense to signify all associations of men founded upon consanguinity. I have done this because I wished to abstract the conception of the family

<sup>1</sup> See Lyall's *Asiatic Studies*, First Series, chap. vi.



from all the differences and peculiarities which time and local influences have worked into it. What I have been describing is not the gens, nor the *yévos*, nor the clan; not the joint family, nor the village community; not the tribe, nor the sept, nor the caste; but, if I may so say, it is the type towards which all these will be found more or less to converge.

I have also hitherto been speaking of society only in its primitive forms, as it is disclosed to us by the scattered remnants of history, or by modern observation of barbarous tribes. If we now turn our attention to times when men may consider themselves even moderately civilized, we find that society is organized after a new method. Men are accounted to belong to one and the same community without any idea of their being connected by consanguinity at all. They are united together either because they obey the same rules, or because they occupy together some defined portion of the earth's surface, or because they practise the same religious observances, or for some compound of these reasons. But the conceptions which are based upon consanguinity are nevertheless not always entirely effaced. Some survive only in a word, or in a phrase, or in a custom, which is nearly extinct. In other cases, however, these conceptions still enter largely into the institutions of a people long after consanguinity itself has ceased to be the bond of union which holds society together. This is especially the case with Hindus. The reason why I have made these observations on the general conception of the family is because, as I have said, although the family is no longer the foundation of society, it is still the foundation of the Hindu law, at least of that part of it which we administer. Our earliest information as to the nature of the Hindu family belongs to a period of time when Hindu society had already advanced to the

stage which I have just described. The Hindus were already ruled by a king who was a stranger to them in blood, and they were broken up into castes in which all sight of a common origin had probably been lost, and whose actually existing bond of union was certainly not consanguinity. The law of the family, instead of regulating everything, regulated only the private relations of the members of the family to each other.

The Hindu family remains then as a survival of the old order of society and of a period when society was based on consanguinity. We do not, however, in the ancient Hindu literature find any full description of the family. Nor is it to be expected that we should. The more universal a notion is, the less we are likely to find written about it, especially in early times. Even in the Laws of Manu we find very little on the subject, though what we do find is of great interest. The subject is taken up with reference to a difficulty which we were just now considering—What is to be done when a break-up of the family is threatened by the death of the common ancestor? Upon this subject the author of the Laws of Manu says:<sup>1</sup> ‘After the death of the father and of the mother, the brothers being assembled may divide among themselves in equal shares the paternal (and the maternal) estate; for they have no power (over it) while the parents live: (or) the eldest alone may take the whole paternal estate; the others shall live under him just as (they lived) under their father.’ And again:<sup>2</sup> ‘Either let them thus live together, or apart if (each) desires (to gain) spiritual merit, for (by their living) separate (their) merit increases, hence separation is meritorious.’

No special attention need at this moment be paid to what is here said about the mother, all trace having long

<sup>1</sup> Chap. ix, v. 104.

<sup>2</sup> v. 111.

ago disappeared of any such position as is here attributed to her.<sup>1</sup> The first important point to be noticed is the authority attributed to the father, and to the eldest son who replaced him at his death. If the family remained undivided their will was absolute, and their commands indisputable. The second important point is the very emphatic announcement that the continuance of the family after the father's death was voluntary, it being open to the brothers to demand a separation. '*Nemo in communione potest invitus detineri*' has always been a maxim of the Hindu family law.

It may be that the view of the family given in the Laws of Manu was not at any time universally accepted by Hindus, but the wide acceptance enjoyed by the authority from which this description is taken renders it extremely probable that it prevailed amongst a considerable number of them, and that the divergences were not great. The importance of it appears to me to consist in the practical control which it gives to the younger brothers over the theoretical independence of the elder. If he did not conform to their wishes, they could destroy his authority by demanding a partition: and it is obvious, therefore, that the position of the elder brother, although theoretically the same, was practically very different from that of the father.

Not a word is said in the Laws of Manu about ownership. Probably the ideas which that term expresses were by no means familiar at the time. Early writers on law seldom discuss the aggregate of rights which we call ownership. What this ancient author was probably thinking of was rather what we should describe as managership than ownership, and, apart from the question

<sup>1</sup> I do not think any more reasonable explanation can be offered for the position assigned to the mother in the Laws of Manu than that this is a survival of the period when the mother was head of the family, that is, of a period of polyandry.

of the right of alienation (probably at that time a question of comparatively very small importance), the right of uncontrolled managership and the right of ownership are not externally dissimilar.

So far as there was any rudimentary notion of ownership in these early times, it is, I think, pretty certain that the ownership of the family property was vested in the family itself, or to use a modern phrase, ownership was corporate, the family being itself a corporation. And as there are still ideas connected with ownership as it now exists amongst Hindus in India which can only be explained by their having been derived from this corporate conception of ownership, it is necessary to explain what is meant by corporate ownership.

Corporate ownership is best explained by contrasting it with another form of ownership with which we are now more familiar, and which I will call individual ownership. In the simplest case of individual ownership we have one person, and one person only, who exercises all the rights of owner. Thus if A acquires a piece of land, he can either let it, or cultivate it, or build a house on it, or sell it, or give it away. But it is also possible that several persons, say B, C, and D, should jointly acquire a piece of land. It is obvious that their position is very different from that of A. They cannot all exercise the rights of ownership in full. They must come to some understanding how the land is to be occupied and enjoyed, otherwise there would be nothing but confusion. Still B, C, and D are individual and independent owners, though their rights of ownership are restricted. Each is the owner of an undivided share, which he can dispose of as he pleases. He can sell it in his lifetime or leave it by will.

But now, take the case of ownership by what we call a corporation, and see how it differs from either of these.

For example, let us take a college—say All Souls College, in the University of Oxford. The members of this corporation are the Warden and Fellows. The estates of the College are not owned by the Warden or by the Fellows, or by any one of them. These persons have no rights of ownership whatsoever in these estates, or in any part of them. They have no more right to deal with them than a stranger. If a Fellow of a College were to attempt to take possession of any land belonging to the College, he would be a trespasser. If he attempted to sell to any one any interest in this land, the attempt would be futile, for he has no interest to sell.

The true conception of the ownership of a corporation is so important, that I will take another instance—say a railway company. A railway company consists of the shareholders. But the permanent way, the stations, the rolling stock, and so forth, belong not to the shareholders, but to the company. The shareholders have no ownership in these things whatsoever. If a shareholder walked upon the line of railway without permission, he would be a trespasser: if he took any of the property belonging to the company, he would steal.

Corporate ownership therefore is ownership of a very peculiar kind. No living being is the owner; but there are certain persons who are managers of the property.

When and under what circumstances the Hindu lawyers first began to consider questions of ownership we have no means of ascertaining. But we have clear evidence that there was at one time a very warm controversy upon the subject. The two leading commentaries on Hindu law, the *Mitāksharā* of Vijnānecvara and the *Dāyabhāga* of Jīmūtavāhana, both open with a very long discussion as to when and how a son becomes the owner of the family property. Two conflicting theories are propounded. One is that the sons are

joined with the father<sup>1</sup> in the ownership in his lifetime. The other is that they only become owners when the father dies, or relinquishes worldly affairs, which, according to Hindu ideas, like taking monastic vows, produces civil death. The author of the *Mitāksharā* adopts the first of these views, and considers that sons become co-owners with the father as soon as they are born ; the author of the *Dāyabhāga* the second, and considers that sons do not become co-owners until the death of their father ; and this radical difference of opinion produced the great schism in the Hindu law.

It is to be observed that, according to the *Dāyabhāga* view, the sons not being owners, the father is sole owner. He is both owner and uncontrolled manager ; and from this position most important consequences have been derived, as we shall see presently. According to the *Mitāksharā* view, the father is only a co-owner with his own sons : as soon as a son is born, he becomes co-owner with his father and brothers of the family property. It is obvious that this position is not inconsistent with the father still retaining his control as absolute manager. How far he has done so, I shall consider presently.

But there are other questions which arise about ownership which, at any rate in our day, cannot escape consideration when attention is once turned in this direction. What is the nature of the ownership of the father and the sons in a *Mitāksharā* family ? What happens in any family of Hindus when the common ancestor is dead ?

As far as I am aware, no one of the ancient writers has discussed either of these questions in the abstract, but the leaders of each of the two great schools have framed

<sup>1</sup> Following the convenient custom adopted by the Hindu lawyers, I use the expression 'father' to include father, grandfather, &c., the person indicated being the living ancestor ; and the word 'sons' is likewise used to include all the direct male descendants of that person—grandsons, great-grandsons, &c.

a system, which supposes them to be decided in a particular way.

The Mitāksharā lawyers always assume the ownership to be vested in the family as in a corporation, and not in any individual member of it, whether the father be alive or not. I do not mean that this language is used by any Hindu author. I do not suppose that there is any Sanskrit equivalent for the word 'corporation'. But this is the only language in which a modern lawyer can sum up the result of the views which the Mitāksharā lawyers held on this subject. They do not admit that the father was owner to the exclusion of the sons, but neither do they admit that the sons are individually owners of anything. Each member of the family is nothing more than the member of a community to which the property belongs. This is not a partnership, but a corporation. No one has anything to dispose of as he likes, not even his undivided share. When the father dies there is no change of ownership ; it remains as before, vested in the community.<sup>1</sup>

It is quite otherwise in a Dāyabhāga family. As between the father and the sons, all the rights of ownership are centred in the father. Whatever may have been the case originally, the father has long ago absorbed them all. From being the sole manager, he has become the sole owner. When the father dies the brothers are the joint owners, each of his own share, and there is no corporation, but only a partnership.

#### SELF-ACQUISITION

It must not, however, be supposed that even in ancient times everything was owned by the family in

<sup>1</sup> There are traces of a similar system in the ancient Roman law, and that the father was at one time co-owner with the sons of the family property. Cf. *Inst.* ii. 19. 2, where it is said, 'sui quidem heredes ideo appellantur (i. e. the sons), quia domestici heredes sunt et vivo quidem patre quodammodo domini existimantur.'

common. The possibility that an individual member of the family could have something which was exclusively his own is clearly recognized in the Laws of Manu. Thus<sup>1</sup> it is said, 'Property acquired by learning belongs solely to him to whom it was given, likewise the gift of a friend, a present received on marriage or with the honey-mixture.' And in v. 208, 'What one brother may acquire by his labour without using the patrimony, that acquisition made solely by his own effort, he shall not share unless by his own will with his brothers': and these texts, as we shall see presently, are of practical application. In Rome the son who, as a general rule, could acquire nothing for himself, could, by a special favour, retain as his *peculium* what he had himself acquired in war or in the service of the state. So in the ancient Teutonic law, side by side with the *allod*, or ancient inalienable family domain, we find the *terra comparata*, or acquired property, which the owner could dispose of as he pleased. Thus, too, Glanvil, writing of the English law so late as in the reign of Henry II, says, a man may have either ancestral property (*haereditas*), or he may have acquired property (*questum*), or he may have both: and then he goes on to say that whilst his power of disposing of the *haereditas* is restricted, his power of disposing of the *questum* is unlimited.

So, as Sir Henry Maine has observed,<sup>2</sup> the many counterparts of the Indian rule and the Indian exception are to be found in the ancient Irish law. By that law, if a man earned money by following any other profession than the profession of his family, he could give two-thirds of it to the Church, but what he earned by following the profession of his family was subject to the same rule as the land of the family.

<sup>1</sup> Chap. ix, v. 206.

<sup>2</sup> *Early History of Institutions*, p. 110.



## CHAPTER III

### THE MODERN HINDU JOINT FAMILY

A HINDU joint family is a community, all the members of which are descended from a common ancestor through males, or (as in the case of an adopted son) are assumed to have been so descended, together with the wives and unmarried daughters. In its complete form the members of this family are joint in food, worship, and estate. That is to say, they share a common meal, have a common idol or common idols, and enjoy their property in common. The main external features of such a family are the same all over India. The difference between the *Mitāksharā* and *Dāyabhāga* law does not affect the ordinary relations of the family, or their enjoyment of the family property. It is only in the case of death, partition, or alienation of the family property that the peculiar characteristics of these two systems become apparent.

Every Hindu family has a common home. I do not mean by this that there is a single home in which all the members of the family continuously reside, but there is one home where the family gods remain, and to which every member of the family is at liberty at any time to resort. This is the real home of a Hindu. Any other residence is looked upon as temporary. Here also the wives and children generally remain when the men are employed at a distance. With regard to the enjoyment of the family property, there is no distinction except such as the members of the family themselves choose to make. Everything is enjoyable in common. This is the same

all over India—in Bengal under the *Dāyabhāga*, as well as elsewhere under the *Mitāksharā*. It is very necessary to distinguish between ownership and enjoyment. Notwithstanding the difference in ownership under the two systems, there is no difference in the enjoyment. Alike under both systems there is one common fund into which everything is paid, and out of which the wants of every member of the family are supplied. No one is compelled to contribute anything to the common fund. No one member can say to another, if you do not work you shall not share in the profits of our labour. No one member can say to another, you have consumed more than your share and you must make it good. On the other hand, whatever is earned goes into the common stock. Though separate acquisition is, as I have already said, possible, it is exceptional, and there is always a presumption that the earnings of all the members belong to the common fund. The accounts of the family are kept by the manager, who is generally the eldest male, and he also manages the family property. But he is assisted and controlled by the other members of the family. Any expenditure, on whosoever behalf it is made, is considered as an expenditure on behalf of all; and no separate account is kept of what each member contributes or receives. The expenditure on behalf of the various members of the family is scarcely ever equal, but this inequality creates no debt between the members of the family. If any one is dissatisfied he can protest, and, if his protest is disregarded, his only remedy is to ask for a partition.

In a modern Hindu family, as in that of ancient times, there is always a manager. But the manager is not now absolute. Under the *Mitāksharā* even the father's powers are limited: and under both systems, where the family consists of brothers or other collateral members, the manager, so far from being independent, is looked upon

as the agent of the family, to the members of which he is responsible, and from whom he derives his authority.

The manager, or *kurta* as he is called, is generally, but not necessarily, the eldest male. His powers are such as the other members of the family choose to delegate to him. These, however, are not generally formally expressed, and the extent of them must be gathered from the usual course of dealing, either amongst Hindus generally, or in the particular family in which the question arises. To some extent the ordinary law of principal and agent will apply to such a case. For example, the rules as to ratification contained in ss. 196 sqq. of the Contract Act, and the rule as to an agent acting within the scope of his authority contained in s. 237 of the same Act, would apply to a *kurta*.

It is, I believe, the custom that all the adult male members of the family should be consulted in matters of serious importance. Any member, however, who was absent would be considered as bound by what had been done in the usual course of business in his absence.

The management of the affairs of a Hindu family assumes a somewhat different aspect when, as is frequently the case, an extensive business is carried on by the family. We very often find a Hindu family carrying on business in several places at once—for example, at Allahabad, Lucknow, Delhi and Calcutta. In such a case the representative of the family and the manager of the business at each place is generally one of the adult co-owners. The rapidity which is necessary in commercial transactions renders it impossible to consult the members of the family on all important topics; and, of necessity, therefore, each representative would be assumed to have authority to do whatever was necessary and usual in the particular kind of business carried on.

## ALIENATION OF FAMILY PROPERTY

There are indications in the ancient Hindu law that under that law, as under every other system of law in Europe or Asia, land was at one time not the subject of sale. But that restriction has now altogether disappeared, and immovables, like movables, may be bought and sold freely.<sup>1</sup>

But here, as in other cases, the question under consideration presents itself differently, accordingly as we are dealing with the *Dāyabhāga* or *Mitāksharā* law. Under the *Dāyabhāga* law each member of the family, being owner of his undivided share in the family property, can dispose of it as he pleases. Of course the purchaser cannot be introduced into the family, and the share to which he is entitled must be separated from the rest of the property.

Under the *Mitāksharā* law the ownership, as already explained, is not vested in the several members of the family. No one of them is in any sense owner or part owner of the family property. A member of the family has, therefore, no more right to dispose of the family property, or any part of it, than a shareholder in a railway has a right to dispose of the land over which the railway passes. If therefore he attempts to sell it or any share in it without the consent of the other members of the family, he is met at once by the objection that a man cannot sell what does not belong to him. But this is not so complete an answer as at first sight it seems to be. True it is that the member of the family is not the separate owner of anything, but, as will be shown in the next chapter, he

<sup>1</sup> There is a passage in the *Mitāksharā* which speaks of the consent of townsmen, of kinsmen, of neighbours, and of heirs to a transfer of land (see *Mit.* I. i. 31). These restrictions appear, even then, to have become obsolete, but they point to a time when alienation was restricted.

is in a position at any moment to become so by simply demanding a partition. He will then become the separate owner of his share, which he can sell as he pleases. And, as a matter of fact, Hindus do very constantly sell their shares (that is, the share to which they would be entitled on a partition) to purchasers: and it is not altogether unreasonable to make this transaction good by allowing the purchaser to do what the vendor might himself have done, that is, to exercise the right which the seller had of demanding a partition.

This question has been the subject of much debate in India. It has been eventually answered, but differently in different parts of the country. In Madras and Bombay, where the corporate nature of family ownership is fully acknowledged, it has nevertheless been held by the courts that a co-owner may sell the share which would come to him on partition. In other parts of India, where the *Mitāksharā* prevails, the stricter doctrine that a man cannot sell his undivided share is still insisted on, but there is some indication that a sale of his right to a partition may be recognized by the courts.

It is obvious that a purchaser who has paid or has agreed to pay money for his purchase, is in a different position from a person who is merely an object of bounty. If, therefore, a member of a *Mitāksharā* family were to promise to give away his share of the property to any one whom he wished to benefit, receiving nothing in return, there is no part of India in which the transaction could be enforced.

The alienation of any portion of the immovable property of the family is always looked upon as a matter of exceptional importance, and as one which requires the consent of all the co-owners, or, at least, that all should be consulted. The only exception to this rule is where the sale is necessary in order to protect the

property itself, as to pay the Government revenue, or rent, or to avoid a sale in execution of a decree. In cases of this kind a valid sale may be made, although all the persons, whose consent would be otherwise necessary, have not concurred in it.

## CHAPTER IV

### PARTITION OF THE JOINT ESTATE

IF any member of a Hindu family is hopelessly dissatisfied with the management of the joint estate, his only remedy is to claim a partition. This he can always do, for, as appears from a passage in the Laws of Manu which I have already quoted,<sup>1</sup> there never was any compulsion upon the members of a Hindu family to live in common. The right to separate was always acknowledged, and the exercise of the right was in no way considered discreditable. Considerations of prudence have mainly guided Hindus to a decision as to whether or no it was desirable to separate.

In a natural family<sup>2</sup> living under the *Dāyabhāga* law there can of course be no partition. The father may, if he pleases, distribute his property amongst his sons. This, however, is a distribution of his own property, and he can distribute it as he likes. But this absolute power of the father has only been recently established. It used to be thought that, if the father made a distribution, he must give to each of his sons an equal share. This is probably a survival of the notion that the sons were associated with the father in the ownership in Bengal as elsewhere in India.

It is otherwise under the *Mitāksharā*. Under that law, the father and his sons being co-owners, the sons can insist that, if a partition is made, their rights shall be respected. Whether, under the *Mitāksharā* law, the

<sup>1</sup> *Supra*, p. 32.

<sup>2</sup> I use the term 'natural family' to indicate a family in which the common ancestor is alive, and to distinguish it from a joint family consisting of several brothers or their descendants.

sons have a right to demand a partition in opposition to the wishes of their father has been much disputed. A decision of the Bombay court is in favour of the sons having such a right. If, however, the father has become incapable of managing the property, the sons can always without his consent have a partition.<sup>1</sup>

In modern times if a partition takes place, and all the co-owners insist upon it, every single article of property must be divided. This is so under both systems. If any exception is desired it must be agreed to by all: and very frequently the family idols are allowed to remain joint, as well as the building in which the idols remain, and in which the family worship is conducted. But this, like everything else, depends upon the goodwill of the parties, and the courts have no power to compel the members of the family to continue their worship jointly. If, therefore, there is only one idol, or one which is a special object of veneration, the right which each has separately to worship it must be satisfied by giving to each a 'turn of worship' as it is called, that is, a right to have the idol in his custody for a certain period.<sup>2</sup> In other cases where there are several idols they are distributed.

It is remarkable that in the Laws of Manu no such complete severance as can now be required, and as is generally made, could be demanded. A list of articles is given of considerable importance, of which there could be no partition. These articles are thus enumerated:<sup>3</sup> 'A dress, a vehicle, ornaments, cooked food, water, and female slaves, property destined for pious uses and sacrifices, and a pasture ground.' The meaning, I take it, is that they are to be used in common as before partition,

<sup>1</sup> Mitakshara, I. ii. 7.

<sup>2</sup> An instance of this will be found in *Bengal Law Reports*, vol. 14, p. 166.

<sup>3</sup> Manu, ix. 219.



it not being at that time contemplated that the members of the family after separation would live very far apart. Even in much later times the common way to the family home is spoken of as impartible. As might be expected, nothing is said in the Laws of Manu about the arable land, but another ancient sage quoted by the author of the *Mitāksharā* declares it to be impartible.<sup>1</sup> The prohibition is got rid of by later lawyers by an audacious supposition that it only refers to land obtained by gift under certain conditions. But the text is in its terms, and was no doubt intended to be, perfectly general, and it remains as a proof that such a prohibition once existed. All this seems to point to a time when the family even after partition continued to live together or at least in separate homes within the same enclosure. At what date these impartible things became partible we have no means of ascertaining. The author of the *Dāyabhāga* treats everything as partible, just as we do now.

Rulers in India, especially rulers of smaller principalities, are apt to look upon their territories as their own private property, but I am not aware of any case in which the succession to a throne has been treated as partible. Hereditary offices have not unfrequently been so considered. They are partitioned by making the office enjoyable by members of the family in turns.

There are instances to be found of families in which by a special custom the family property is not partible. The validity of such a custom has been frequently recognized. This custom is generally found to prevail in the families of petty princes who at some time have possessed sovereign powers, as is indicated by the term *raj*, which is frequently used to describe a family property of this description. Of course, in British India

<sup>1</sup> I. iv. 26.

the sovereign rights of these persons have been swept away, but they have in some cases retained the title of *rajah*, and their peculiar customs. In an impartible *raj* the property is taken by the eldest son in the line marked out by the custom, the other male members of the family getting allowances, generally in the form of temporary assignments of portions of the family property.

Of course, nothing but what belongs to the family in common can be divided. The self-acquired property of any of the members of the family is not affected by the partition. A very important question, therefore, frequently arises when a partition is made as to what is and what is not family property.

If a member of the family dies leaving a pregnant widow, the partition should be deferred till she is delivered; and if it turns out that the child is entitled to a share, the partition will then be made accordingly. If the partition is made earlier, and the child turns out to be a male, the only course seems to be to reopen the partition, if the child's guardians insist upon it: though this may be sometimes avoided by each sharer contributing something to make up the child's share.

#### EXCLUSION FROM A SHARE ON PARTITION

Persons who under ordinary circumstances would take a share upon partition may be disqualified from doing so by certain specified imperfections. According to the Laws of Manu,<sup>1</sup> 'eunuchs, outcasts, persons born blind or deaf, madmen, and such as have lost the use of a limb', are excluded. According to Yājñavalkya, a person afflicted with an incurable disease is also excluded. The leaning at the present day, however, is against such exclusions, and they have been cut down as much as possible. Outcasts have been relieved by Act XXI of 1850, which

<sup>1</sup> ix. 201.

expressly repeals this disqualification. I never heard of a eunuch being excluded, or a person who had lost a limb. The only disease which would now exclude is the worst form of leprosy. With respect to madness, it has been held that a person who is out of his mind at the time of partition cannot claim a share.

There has been some attempt to extend considerably the grounds of exclusion by an introduction of vague moral disqualifications. This attempt has not been successful, our courts having steadily resisted the introduction of rules which would be more likely to disturb the peace of families than to enforce any real purity of manners.<sup>1</sup>

#### SELF-ACQUISITION

When I was describing the Hindu joint family I mentioned that the inconvenience of family ownership had been in some degree mitigated by the establishment of a principle that what a man had acquired as the reward of his own independent exertions or merit, without any assistance from the other members of the family or from the family funds, belonged to himself alone, and was not included in the family property; and I pointed out the analogy in this respect of the Hindu law with the law of other countries in which we find similar contrivances. The subject of self-acquisition is one of increasing importance, and I shall therefore add something to what I have already said upon the subject. I will quote again the two passages from the Laws of Manu, which are the foundation of the law upon this subject: 'Property acquired by learning belongs solely to him to whom it was

<sup>1</sup> The person whom it has been attempted to eject on the ground of moral disqualification is the unchaste widow. But the High Court of Calcutta, after very full consideration, has held that when the property has once vested in the widow she cannot be ejected should she subsequently become unchaste.

given ; likewise the gift of a present on marriage, or with the honey-mixture.'<sup>1</sup> 'What one brother may acquire by his labour without using the patrimony, that acquisition made solely by his own effort he shall not share, unless by his own will, with his brothers.'<sup>2</sup> The principles thus broadly laid down have always been adhered to. The presents which a man receives on his marriage, or on other occasions, are not so large as to be important, but the earnings of a single member are often very considerable, and it may become a question of very great importance whether or no these earnings are to be thrown into the common stock. Upon such a question, the qualification that the acquisition must have been made 'without using the patrimony', or, as it is sometimes put, 'without detriment to the joint estate,' is a very material one. If, for example, any one of the members of the family carries on a trade, and uses as capital for this purpose any portion of the family funds which has come into his hands, then the profits cannot be claimed as a separate acquisition. Some of the courts in India at one time seemed disposed to hold that even the gains made by a member of the family following his profession must be treated as family property, if the education of the individual who earns them has been paid for out of the family funds. But this view has been denied. It is thought, and with good reason, that if the principle of including in the family property everything to the earning of which the family funds have contributed, however remotely, be rigidly insisted on, self-acquisition would disappear altogether. A man's very existence depends upon the nourishment supplied to him before he is able to earn his own maintenance, and even the child sucking at the mother's breast may be said to draw upon the resources of the family. Mr. Justice

<sup>1</sup> Chap. ix, v. 206.

<sup>2</sup> v. 208.

Dwarkanath Mitter, a distinguished judge of the High Court at Calcutta, and himself a Hindu, has declined to accept this extreme view.

There is rather a peculiar case which sometimes occurs, and which has given rise to some discussion. It is the case of property which, by some means or other, has been wholly lost to the family, and has been recovered by the exertions of a single member. The Hindu lawyers have doubted how far, if at all, this is to be looked upon as property acquired for himself by the individual to whose exertions its recovery is due. The discussion appears to have ended in a compromise. The recoverer of the property can claim for himself one-fourth only; the remaining three-fourths belong to the family. But the claim to this extent will only be allowed when the recoverer has expended his own money only, and not any of the money of the family, in prosecuting the claim. He must also have acted with the most perfect good faith towards the other members of the family. If he has tried to gain any unfair advantage for himself, or to anticipate the other members of the family, his claim will be disallowed.

Questions as to whether property is family property or self-acquired are sometimes very difficult to determine. The main question will always be whether the family funds were used in the acquisition. There is a broad general presumption that all property acquired by any members of the family is family property, and he who claims it as his separate property must prove his claim. This he may do in some cases by showing that there was no surplus of family property after the bare necessities of the family were provided for; and therefore no funds which he could have used for the purpose. Where, however, a family has more than enough for the bare necessities of life, the courts generally require the party who alleges self-acquisition to show by positive evidence that no family

funds were used in the acquisition, which a careful man who has kept proper accounts could always do, if the allegation were true.

It must be borne in mind that self-acquired property becomes family property, that is, joint property, as soon as it has been once inherited by descendants. Thus if a man by a separate trade earns R10,000 and dies leaving two sons, and a son of another son who is dead, these three persons form a new family, to which family the R10,000 belongs as family or joint property. The contrivances for keeping self-acquired property and family property apart through successive generations, which we find in some countries,<sup>1</sup> are not known to the Hindu law. So also family property which has been partitioned remains family property still : only instead of belonging to the old family which has been broken up it belongs to the new family or families which are being formed. Thus, if on a partition X, a bachelor, gets a piece of land as his share, and afterwards X marries and has a son Y, then, if the parties are living under the Mitāksharā law, X and Y become at the moment of Y's birth a joint family, in which the property is vested. In short, all property which comes to a man through his ancestors is family property, and for this reason it is sometimes called by the name of 'ancestral property'.

<sup>1</sup> *Supra*, p. 38.

## CHAPTER V

### OF THE RIGHTS TO PROPERTY WHICH ARISE ON DEATH OR PARTITION

UNDER the Hindu law the questions which arise on the death of an owner of property are to a considerable extent identical with those which arise on partition, so much so that the distinction between them is not always observed.<sup>1</sup> If I had followed the usual practice of English writers on Hindu law, I should have headed this chapter by the word 'Inheritance'. Even the translations of the *Mitāksharā* and the *Dayabhāga*<sup>2</sup> are always spoken of as treatises on inheritance, whereas both of them are, as the authors of the originals are careful to explain, treatises on partition, and the reason of this will be obvious when we come to see the place which inheritance really occupies under the Hindu law.

Inheritance<sup>3</sup> is the change of ownership which occurs at a death in consequence thereof. It is important to attend to this definition, because it leads at once to the important consequence that as regards the family

<sup>1</sup> In a sense it may be said that the extinction of a family by partition is analogous to the extinction of an individual by death.

<sup>2</sup> The word *daya* signifies 'wealth', not 'inheritance', and *dayabhaga* signifies 'partition of wealth'. See *Dayabhaga*, I. i; and *Mitāksharā*, I. i. 1, where the author says 'The partition of heritage (*daya*) is now propounded by the image of holiness'.

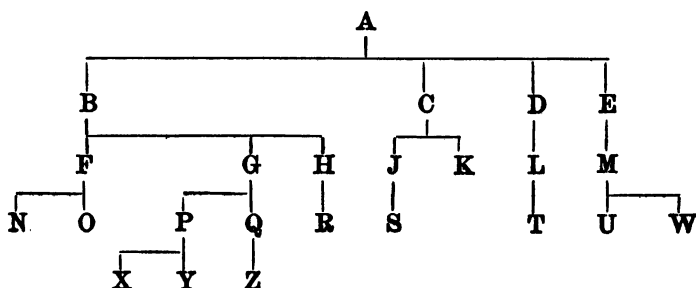
<sup>3</sup> The word 'inheritance' frequently occurs in Colebrooke's translation of the *Mitāksharā*, but not in the sense here explained, and which is the one usually attributed to it by lawyers. For example, when it is said (*Mit.* I. i. 3) that the wealth of the father becomes the property of his sons, and that is an 'inheritance', what is meant is that it becomes their property not at the death of their father, but at their own birth, as the author goes on to explain.

property there can be under Mitāksharā law no such thing as inheritance. Such rights as a man has, he acquires at his birth. Neither his own death nor the death of any other member of the family makes any change whatsoever in the ownership of the family property. This follows at once from the nature of the family ownership under Mitāksharā law, which, like that of a corporation, is vested not in the individual members of the family, but in the family itself. Here, therefore, we have to do with partition only. The question we have to solve is—What share does each member of the family get when the family breaks up?

#### RULES OF PARTITION UNDER MITĀKSHARĀ LAW

The Mitāksharā family, it must be remembered, consists of the male descendants through males of a common male ancestor; the wives and daughters are looked upon as appendages of their husbands and fathers: the relatives through females do not belong to the family at all.<sup>1</sup>

The rules of partition applicable to the case are based upon a principle which is by no means peculiar to India, and which I shall endeavour to explain. I may call it by the name of 'partition by groups'. The following diagram will represent a Mitāksharā family, of which A is the common ancestor; all being males:



<sup>1</sup> *Supra*, p. 37.



The whole family forms a group which I will call the group A : and it is evident on inspection that the family may be divided into a number of smaller groups all similar to the group A in this—that each group consists of a man and his male descendants. The whole family, as well as each portion of the family whose lines of descent meet in a common ancestor, forms groups of this kind. Thus, besides the whole group A, we have the group consisting of B and his descendants which I will call the group B. Similarly we have the group C, the group F, the group G, and so on. A group may die out altogether, as, for example, if U and W both died childless, E and M having already died.

Now the rules of partition in a Mitāksharā joint family obviously proceed upon the supposition that the family on breaking up separates into groups of the kind above described, each larger group subdividing itself into smaller ones, and that the shares are regulated by the number of the groups, and not by the number of individuals in the group. Thus suppose that when the partition is made the surviving members of the family are N, O, S, T, X, Y, Z, then in order to find what share each will take we must go back to the common ancestor A. At A's death there were four groups but, at some time (it is immaterial when) by the death of E and all his descendants the groups have been reduced to three, hence the first division of the family is into three groups, the group B, the group C, and the group D, indicating a division of the property into three parts. The group B was originally represented by three smaller groups, but now by only two, the group F and the group G, and to each of these two groups we assign the half of one-third of the share assigned to the group B, or one-sixth. Of this one-sixth N and O will each get a half or one-twelfth, for these two persons having no father

and no children each constitutes a group by himself. The other one-sixth is divided between the groups P and Q, so that ultimately X and Y each get one-twenty-fourth, whilst Z gets one-twelfth.

By a similar process we should find that S and T each get one-third of the family property, they being the sole survivors of the groups to which they belong.

Thus we see that not only the number of persons forming the group is disregarded, but the distance of the individual from the common ancestor is disregarded.

For the sake of simplicity I have taken a case where no example occurs of a father and son being both alive at the time of partition. But this must frequently happen. For example, suppose P as well as X and Y to be alive when the partition takes place. One-twelfth will then be assigned to the group P. It is remarkable that the written sources of Hindu law give no indication as to what is to be done in such a case, and this seems to indicate that under the ancient law no further division was contemplated. But it is now held to be permissible,<sup>1</sup> and therefore a rule had to be framed to meet it, and no fairer mode of division could be suggested than that the father and sons should take in equal shares.

These are the rules applicable where the owners of the property are the several members of a joint family under the Mitāksharā law, and they are engaged in making a partition. But, as already stated, every Hindu may acquire property which is exclusively his own, and this property at the death of the owner devolves upon his heir, in other words, it is inherited, and the rules of inheritance applicable to such property we are now about to consider.

<sup>1</sup> *Supra*, p. 46.

## RULES OF INHERITANCE UNDER MITĀKSHARĀ LAW

The rules of inheritance are, in a general way, very similar in all parts of the world. Everywhere a man's property is taken by his nearest relatives: all systems of inheritance give some preference to males and the relatives through males over females and the relatives through females. The differences which we find mainly depend upon three considerations:—(1) the degree to which this preference is carried, (2) the mode in which distance of kinship is reckoned, (3) the extent to which primogeniture is considered.

The relatives of a man through males are called his agnates: the relatives of a man through females are called his cognates. Under the Mitāksharā law a very large preference is given to agnates, but none to the eldest son over his brothers.

Under the Mitāksharā law, as nearly always is the case, a man's nearest relatives are considered to be his sons. If there is one son he takes the whole, if there are several sons they take equally.

If a man have no son living, then the sons' sons succeed: and if he have no grandson then the sons' sons' sons succeed.

It is very unlikely that a man should die leaving great-great-grandsons but no intervening descendant. It is, however, said by Hindu lawyers that if this should be the case the great-great-grandsons would be passed over. It is not easy to assign a reason for this. As we shall see presently, there are other cases where the line is broken off suddenly at a similar distance of three degrees from the *propositus*, as the person is called whose property is to be inherited. Nor is this separation off of an inner circle of relationship confined to Hindus. We find in Roman law 'the agnates counted

up to the sixth degree—that is, they included all the descendants of a common great-grandfather', and similar separations are found in Greece amongst the Teutonic nations and in ancient Wales.<sup>1</sup>

If there is no son, or son's son, or son's son's son the widow is the heir. The claim of the widow to succeed has been much disputed. It is discussed at great length in the second chapter of the *Mitāksharā*, and the conclusion is in favour of the widow. The admission of a female of any kind to a share in the property is undoubtedly contrary to the general spirit of the ancient Hindu law. It is true that we find in the Laws of Manu some traces of women having had at one time a strong position as regards property, but, as we have seen, they are entirely disregarded in a *Mitāksharā* joint family, and it is only the later sages who recognize clearly the widow's right of inheritance of separate property.

The right of the widow to succeed may have grown out of the right (which, as I shall show hereafter, is universally acknowledged) that every Hindu woman has to be maintained by her family; or it may have originated in the custom which prevailed at one time by which a man otherwise childless appointed his wife to 'raise up seed' for him after his death.

Failing the widow, the daughter is the heir. Her right has not been disputed. Her right to inherit is probably connected with the custom which at one time prevailed of appointing a daughter to raise up issue to her father: and this explanation is countenanced by the fact that the unmarried daughter succeeds in preference to, and to the exclusion of the married.

On failure of the daughters the daughters' sons succeed. This they would naturally do, when it is

<sup>1</sup> Hearne, *Aryan Households*, p. 172.

once admitted that in default of male issue the daughter's son keeps up the grandfather's line.

On failure of the daughter's sons the parents succeed in turn, and there is express authority in the *Mitāksharā* that (contrary to what we should have supposed as probable) the mother inherits first, and then the father. It has been stated as a reason for this, that the mother is physically more closely identified with the son than the father.

After the parents come the father's sons or brothers, then the brothers' sons. If there are several brothers' sons then they all take equally, and not (as is generally the case) the share which their father would have taken if alive; in other words (to use the language of the English law) they take *per capita* and not *per stirpes*. Thus, referring to the pedigree at p. 54, if D dies leaving a nephew M by a deceased brother E, and two nephews J and K by another deceased brother C, then D's separate property will be divided equally between J, K, and M, each taking one-third. It is not surprising to find that this has been disputed, and that some writers have thought that M ought to take one-half, and J and K one-fourth each. The succession *per capita* is very rare in Hindu law.

The line of succession is not continued beyond the brothers' sons, and this is in accordance with the rule above stated as to direct male issue, the nephew like the great-grandson being three degrees distant from the deceased.<sup>1</sup>

Failing the brothers, and brothers' sons, the father's mother succeeds; then the father's father, then the father's brothers, then the father's brothers' sons who take *per capita*, as in the earlier generation.

<sup>1</sup> In Western India, where the *Vyavāhara Mayūkha* is a great authority, the next in succession after the paternal grandmother, and before the paternal grandfather, is the sister. This authority is very favourable to women in general.

Failing these the father's father's mother succeeds, then the father's father's father, then the father's father's brothers, and then the father's father's brothers' sons *per capita*.<sup>1</sup>

Here, as we should expect, there is a stop, the third degree of distance from the *propositus* having been reached.

From this point the statements of Hindu lawyers are very scanty and vague. One thing is certain, that no cognates except the daughter's sons are admitted to the inheritance until all the male agnates, however distant, are exhausted.

#### RULES OF INHERITANCE AND PARTITION UNDER DĀYABHĀGA LAW

I now come to the Dāyabhāga law, and here we encounter a different state of affairs. As already explained under this law, although the family property is enjoyed in common, yet the ownership is not vested in the family as in a corporation, but each member of the family who has no living male ancestor is the individual owner of his share. It follows that when a member of the family dies there is a consequential change of ownership, that is, of inheritance. The share of the deceased in the family property devolves on his heirs just in the same way, and under the same rules as his separate property devolves on that person.

Nevertheless, in Bengal the rules of inheritance are closely connected with partition, because since the enjoyment of the family property is, just as under the Mitāksharā, in common, the death of a member of the family makes no *apparent* change: everything goes on as before; it is only when a partition takes place that

<sup>1</sup> A chart exhibiting the order of succession up to this point will be found at p. 66.

the devolution of the shares has to be traced ; it may be, long after the death which caused the change of ownership, a process which is sometimes very troublesome.

The rules which I am about to state are applicable, therefore, to both joint and separate property under the *Dāyabhāga* : and the lawyers of that school base these rules upon a principle which at first sight looks rather strange, but which, as we shall see, is not really very different from the familiar principle of proximity adopted elsewhere and also under the *Mitāksharā*. It requires, however, some preliminary explanation.

All Hindus adopt the widely-known and widely-spread practice of making some sort of offering to their deceased relatives : and the person by whom the offering is to be made, and the nature of the offering, is in India very carefully prescribed, either by the religious texts or by usage. An offering of this kind is said to confer a 'spiritual benefit' on the deceased person to whom it is made. The extent of the spiritual benefit conferred depends upon the nature of the offering and the person by whom it is made.

The *Dāyabhāga* lawyers say that the person who is entitled to succeed as heir is the person whose offering confers the greatest spiritual benefit on the deceased.

This being the theory, it is necessary to see what are the rules which determine the amount of spiritual benefit conferred.

The most important offering which Hindus make to their deceased relatives is that of the *pinda* or rice-cake : and inasmuch as the offering is mutual, that is, A makes to B who is dead the same offering which B would make to A if B were alive and A were dead, then two persons are said to be connected with each other by the *pinda*, and are called *sapindas*.

The offering next in importance is that of the *lepa*,

or fragments of the *pinda*—the crumbs as we should say; and persons connected by this offering are called *sakulyas*.

The offering third in importance is the simple libation of water, and persons connected by this offering are called *samonadacas*.

It follows that *sapindas* succeed first, then *sakulyas*, then *samonadacas*.

But who are *sapindas*, *sakulyas*, and *samonadacas* respectively, and of each class whose offering is most efficacious? Of course, for all the nearer relatives this has been settled long ago, and I shall now state some of the rules which govern this question.

First of all come the sons. No offering is so efficacious as that of the son to his father. Next in the order of the spiritual benefit they confer come the sons' sons, and, therefore, they are the next heirs; then come the sons' sons' sons, and there we stop.

Then comes the widow. It is not easy to establish her right upon grounds of spiritual benefit, and it rests rather upon authority than principle. The opinions of the ancient writers are very conflicting. They are set forth in the *Dāyabhāga* with a conclusion in favour of the widow's right which is now undisputed.

Next to the widow come the daughters, and then the daughters' sons. Then the father, then the mother. After the mother come the brothers, then the brothers' sons, and then the brothers' sons' sons. The reason why the brothers' sons' sons are included is probably because, as the degrees are counted by the *Dāyabhāga* lawyers, they are only three degrees from the *propositus*.

The sisters are passed over, but their sons succeed after the brothers' sons' sons, and after these come the brothers' daughters' sons.

Then we go a step backwards and proceed to exhaust



the prior generation in exactly the same way, and after that is exhausted we take another step backwards. I need not enumerate the successive classes of heirs; they will be sufficiently apparent from the table at p. 67.

Having exhausted in the manner above stated the three generations below and the three generations above the *propositus*, the *Dāyabhāga* lawyers place next in the order of succession the relatives through the mother, whom we call cognates, and the Hindu lawyers call *bandhus*. Some of these, according to Hindu notions, are *sapindas* with the deceased, though they belong to a different *gotra* or family, and in order to distinguish them from the *gotrajā*, or family, *sapindas*, they are called *bhinna gotra sapindas*, i. e. *sapindas* outside the *gotra*.

There has been a good deal of trouble in determining how the order of succession as between these cognates is to be drawn up. The difficulty arose from our finding in the Hindu law-books three different enumerations of them, one in the *Dāyabhāga*, one in the *Mitāksharā*, and one in the *Dayakrama Sangraha*, all, apparently, somewhat capricious. But it is now settled that these lists are only given as examples, and not as complete enumerations of the *bhinna gotra sapindas*.

These *sapindas*, therefore, will have to be ascertained by the usual test, that is, by inquiring whose oblation confers the greatest spiritual benefit. I do not propose to attempt to draw up a list by the application of this test, which requires a good deal of skill in its manipulation. It is not, of course, very frequently the case that we have to go to the mother's relations to find the heir.

Having exhausted the *sapindas*, we must now turn to those who are connected with the deceased by the inferior oblations, the *sakulyas* and the *samonadacas*. But the Hindu law-books are not very clear as to the

line of succession amongst these remoter relatives. It is at any rate certain that these two classes of heirs comprise between them all the remaining male agnates.

The most explicit statement of the Bengal law on this point is to be found in the *Dayakrama Sangraha*. The *sakulyas* are there said to be of two descriptions, the descending and ascending. The first includes the sons, sons' sons, and sons' sons' sons of the great-grandson of the deceased; the second includes the father, father's father, and father's father's father, of the great-grandfather of the deceased. The collaterals are not named at all, but I suspect that in this point the enumeration is incomplete, and that the collaterals of three generations ought to be included at each step.

Where there are several persons whose offerings are precisely of the same efficiency, they all take; nor is there any preference of the elder over the younger. Thus several sons take equally. But several grandsons, though they all take, do not of necessity take equally. Thus if A dies leaving two sons of one son B, and one son of another son C (B and C being dead), then the two sons of B will each take one-fourth, whilst the son of C will take half. In other words, the sons only take what their father would have taken if alive.

As a rule, those who are of the whole blood are preferred to those of the half blood, and those who were joint in estate with the *propositus* at the time of his death are preferred to those who have separated from him.

As to all these rules of inheritance under the *Dāyabhāga*, the lawyers of that school affirm that they are governed by the amount of spiritual benefit conferred; but, as will have been seen, they do, as a matter of fact, conform generally to the same or nearly the same principles of proximity as govern the *Mitāksharā* law. And as in all probability the rules which relate to the amount

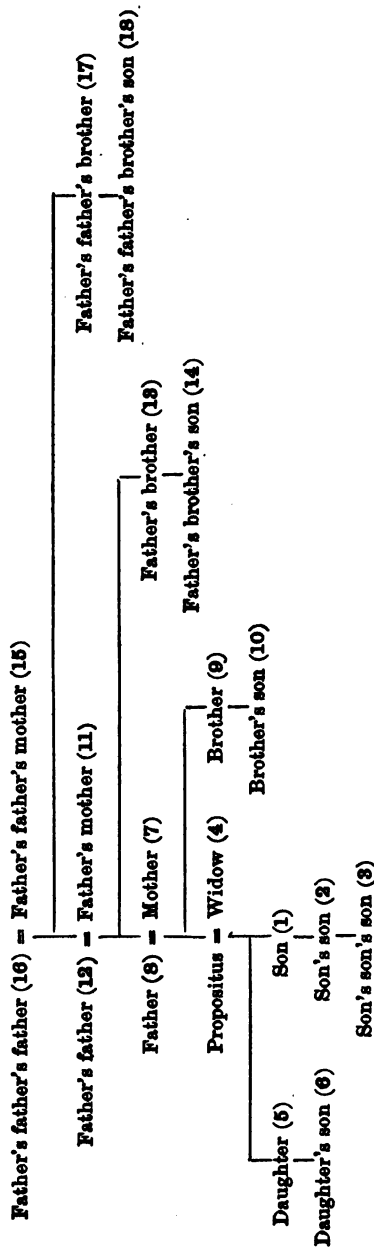
of spiritual benefit conferred are better known everywhere than the somewhat arbitrary rules which govern the calculation of proximity, it would not be surprising if we were to find the *Mitāksharā* lawyers solving questions of proximity by an estimation of the spiritual benefit conferred.

I have dealt in this chapter with the rules of inheritance only so far as they relate to inheritance from a male *propositus*. It will be more convenient to deal with the rules of inheritance from women in the chapter on Women's Property.

Whatever defect would exclude a person from a share on partition would likewise exclude him from inheritance.<sup>1</sup>

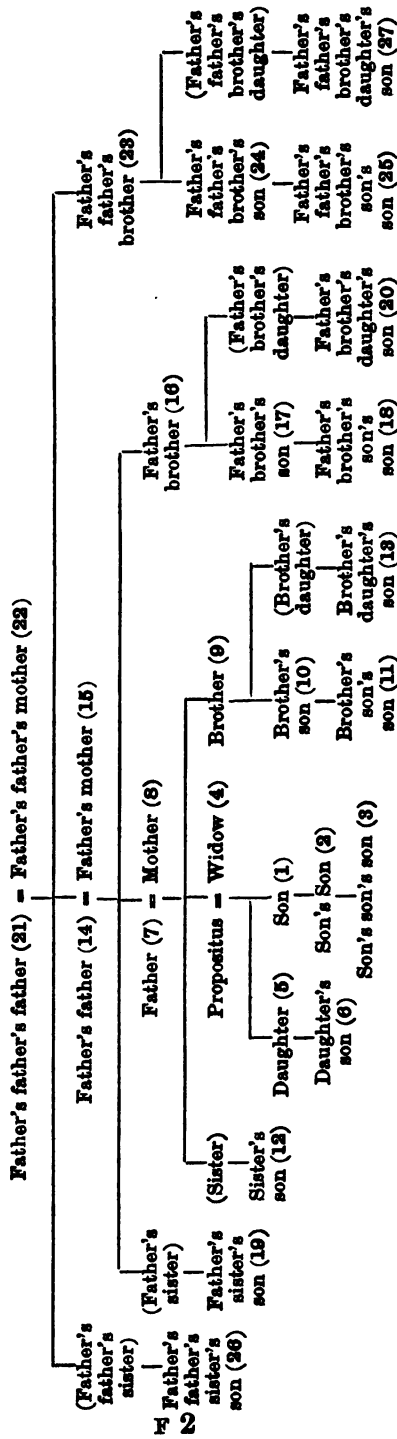
<sup>1</sup> As to these defects see *supra*, p. 48. An unchaste woman is also excluded from inheritance.

# I. ORDER OF SUCCESSION UNDER THE MITAKSHARĀ



N.B.—The singular is used throughout in this and the following chart for the sake of convenience (e. g. son, son's son, &c.), but it must be remembered that in each case the word represents the class, and that there being no right of primogeniture the whole class take concurrently, and in most cases *per stirpes*, but in a few cases *per capita*, as explained.

## II. ORDER OF SUCCESSION UNDER THE DAYABHĀGA



## CHAPTER VI

### WILLS

A WILL is a disposition of property made by the owner, which has no effect during the life of the owner, but takes effect upon his death.

A will, therefore, is by its nature revocable if the person who made it thinks fit to revoke it, and this distinguishes it from a gift, which, if once completed, is irrevocable.

The distinction between gifts and wills is sometimes lost sight of, and this is particularly the case in the earlier discussions on the subject of Hindu wills. I have examined a great many of the earlier cases of supposed wills in India, and outside Calcutta (where, as we know, the judges at first applied English law generally) they all seem to me to be not wills but gifts.

However, it seems to have been thought that whatever a man could do by gift he must necessarily be able to do by will,<sup>1</sup> and the testamentary power of a Hindu was very soon firmly established. This enlargement of the power of owners of property, and the control thereby given to them over the future enjoyment of it, was very

<sup>1</sup> It is scarcely necessary to point out that this is by no means universally the case. In Europe amongst Teutonic nations wills were unknown until these nations came into contact with the Roman lawyers, but then only with limitations. Even in modern times the testamentary power is in most countries not so wide as the power of disposal in a man's lifetime, being generally restricted to a portion of the property as under the Roman law, and also under the Mahomedan law. Even in Scotland it is restricted. In fact it may be said that the English law, from which the Hindu law was derived, stands almost, if not quite, alone.

acceptable to those who exercised it, and this made its adoption easier.

Under the *Dāyabhāga* law the sons are not owners during the father's lifetime. Nevertheless, when we first began to administer the Hindu law there was still a doubt whether the father could by any act of his own deprive the sons of their inheritance, but the doubt was in a short time removed, and it was settled that the father could by his will give away the family property as well as his own separate property to a stranger.

Under the *Mitāksharā* law, as already explained,<sup>1</sup> no member of the family is the separate owner of any shar in the family property, and it follows from this, that under that law no one can dispose of family property by will. But there also the owner of separate property may dispose of it by will.

When Hindus found themselves in possession of the testamentary power they made no scruple about using it. They have even tried to push to the extreme the doctrine that the owner of property may dispose of it as he pleases. They claimed the most extravagant power of disposition, and challenged the courts to find any pretext for placing restrictions upon its exercise. They argued that as ownership is confessedly regulated by Hindu law, all the incidents of ownership, including the power of disposition, must be so regulated also: and that as the Hindu law contained no restrictions on this subject, none could exist. Accordingly, the Hindus began to make the most fanciful dispositions of their property, attempting, as is the custom with testators, to direct how the property should be enjoyed and managed by their successors for many years after their decease, sometimes for ever. But the mischief likely to ensue was so great, that the courts at length determined that the power of

<sup>1</sup> *Supra*, p. 36.

testamentary disposition possessed by Hindus was not unlimited : the Legislature has also interfered ; and it is now established that no disposition by will made by a Hindu is valid unless the object of the testator's bounty is in existence at the testator's death, or is at least a child in the womb. A Hindu may, therefore, regulate as he pleases the succession of his immediate heirs, and of his posthumous children, or if he pleases he may disinherit his own relations altogether, and give his property to a stranger : but the contrivances which had begun to be adopted for tying up property for many generations must now be abandoned, as all such dispositions will be invalid.

The provisions by which these restrictions are imposed are contained in Act XXI of 1870. That Act only applies to Lower Bengal and the towns of Madras and Bombay. But the restrictions themselves originated in a decision of the Privy Council, and they would, no doubt, be applied to all Hindu wills. This Act also contains some provisions as to the execution of Hindu wills. For the execution of wills not governed by this Act no formalities are required.



## CHAPTER VII

### LIABILITY FOR DEBTS

THE law as to the enforcement by a creditor of his claim for a debt against his debtor is always one of the most important practical topics of law in a modern state, and has varied considerably at different times. We have an interesting example in the history of that law in Rome, where, at first, the only remedy was the corporal subjection of the debtor to the power of his creditor, subsequently developed by taking security, and ending finally in a general liability of the property of the debtor during his life and of his estate after his death. In our own country the person of the debtor was in early days liable to arrest, and his personal property could be seized during his life, and could be made available for his debts after his death. But his real property (land and houses) was only very gradually made liable, either during his life or after his death, and it is only quite recently that the general liability of a debtor's whole property has been freed from all doubt and exception. At the same time the power of the creditor to arrest the person of his debtor has been largely curtailed.

In India the liability of a debtor to have his whole property seized and sold in his lifetime has never been doubted since we began to administer the law, and it had probably been recognized long before, however difficult it may have been in the turbulent times which preceded the British rule for a creditor to ensure the assistance of the courts of law. And under the *Dāyabhāga* the rule is applicable to family property as well as to separate

property, since each person is the individual owner of his separate share, which may be seized and sold by a creditor, and the purchaser will have the right to a partition.

But in the case of a family governed by the *Mitāksharā* law, if a decree is obtained against a member of the family and the creditor tries to sell the debtor's interest in the family property, the objection is at once raised that the debtor has no separate interest in this property, and, therefore, nothing which can be seized and sold. This is, no doubt, true, but as has been already pointed out,<sup>1</sup> he can at any moment obtain such an interest by simply demanding a partition. It is not unreasonable, therefore, as some courts have held in the case of voluntary purchasers, to hold, in the case of purchasers at a sale in execution of a decree, that they too are entitled to have the debtor's share separated and made over to them: and this is now the law.

It is desirable to point out that what I have just been saying has reference only to the separate debts of a member of the family. If a debt be properly incurred for the benefit of the whole family, then the family is collectively liable, and may be sued for the debt, just as a railway company could be sued in England, and if necessary the family property may be seized and sold in satisfaction of the debt.

Under the Hindu law, as in Europe, not only is a man liable for his own debts, but an heir is liable for the debts of the deceased person from whom he inherited the property, to the extent to which he has been benefited: and this principle applies, not only to a man's separate property but, under the *Dāyabhāga* law, to his share in family property also, because, when a man dies who is governed by that law, there is a true case of inheritance.<sup>2</sup>

<sup>1</sup> *Supra*, p. 43.

<sup>2</sup> *Supra*, p. 60.

But here again we encounter a difficulty under the Mitāksharā law, where there is no change of ownership when a member of the family dies, and, therefore, no inheritance.<sup>1</sup>

But this reasoning, however logical, does not altogether satisfy our notions of justice : and in the case of a father who at his death leaves unpaid debts incurred, not for the family but on his own account, the courts have contrived to make the sons liable. They base their decisions on certain passages in the Laws of Manu and other ancient legal authorities,<sup>2</sup> which lay it down that sons who have a due regard for their father's happiness in a future life would not leave his debts unpaid, because for this dereliction of duty the father would otherwise suffer torments. And this is considered to be not only an act of filial piety, but a legal duty also, and therefore not only the share which would have come to the father in his lifetime on a partition, but the whole share of the family property to which the father's branch would have been entitled on partition may be seized and sold in satisfaction of the father's separate debts. The sons are in fact treated exactly as if they had inherited that share from the father. But an exception is made when the debt has been contracted by the father for an immoral purpose. There is no duty on the sons to discharge a debt of this kind.

I may mention that if a Hindu dies leaving a will, the person to whom he bequeaths his property is in the same position in regard to his liability to discharge the debts of the deceased as the heir-at-law. He will be liable to the extent of the benefit received.

<sup>1</sup> *Supra*, p. 54.

<sup>2</sup> See Nārada, iii. 10 ; Manu, xi. 66 ; Mayne's *Hindu Law*, chap. ix.

## CHAPTER VIII

### MAINTENANCE

EVERY member of a joint family has a right to remain in the family home and to share with the other members of the family in the enjoyment of the family property, and, as explained above, this right is independent of any contribution which the particular member may himself make to the family property. But this is the right of a person who is himself a co-owner of the property, whereas the right which we term the right of maintenance and which I am now about to consider is the right of a person to be maintained out of property of which some one else is the owner.

It is also necessary to distinguish the subject of maintenance which we are now about to discuss from the subject as dealt with by s. 488 of the Indian Penal Code. That section contains a rather curious jumble of ideas, but it is based mainly upon the notion that in the interests of the community a father is bound to maintain his children, and a husband to maintain his wife. This is a view not without support in the Hindu law, but these particular provisions are of English origin.

The right which I am now speaking of assumes that husbands and fathers will in their lifetime without compulsion fulfil their duties as regards those who are dependent on them, and it contemplates cases in which those dependent persons have by death lost the support which they have hitherto enjoyed.

The right of maintenance may be described as the right to have this support continued. The persons who

are considered to have this right under certain circumstances are widows, parents, sisters, children, and perhaps concubines.

An heir can have no claim to maintenance ; on the contrary it is the heirs who are liable to provide maintenance for those who are excluded from the inheritance. The right of maintenance may, therefore, be viewed as a mitigation of the somewhat rigorous rules of exclusion from inheritance : and it is probably to this view that they, to some extent, owe their origin.

The claim of a widow arises on the death of her husband ; of a child on the death of its parent, and so forth. It is an ordinary civil right to be enforced against the members of the family who are in possession of the property from which the claimant is excluded.

The claim is not merely to the bare necessities of life, but to such a provision as is suitable having regard to the position of the claimant and all the other circumstances of the case.

Of course the sons are generally heirs, and they can, as a general rule, have no claim to maintenance. But if for any defect they should be excluded from the inheritance they would get maintenance. So with widows, unmarried daughters, unmarried sisters, and parents. If they are not heirs they get maintenance. But amongst Hindus there are few unmarried women, so that by far the greatest number of claims for maintenance are made by widows.

No misconduct is considered to deprive a member of the family, so long as he or she remains in the family house, of the right to maintenance. Even an outcast or an adulterous wife is said to be entitled to a bare maintenance. There is good sense in what seems to be the Hindu idea that the family is responsible for its disorderly members,

and that to turn them adrift is an injury to society, besides exposing them to increased temptation.

There has been much discussion as to the obligation of widows to reside in the family house of their deceased husbands. Generally speaking, no doubt, where there is a family house in which maintenance for the members of the family is provided, those who claim maintenance must reside there. But a widow claiming maintenance out of the property of her deceased husband may perhaps be in a different position : and there are certainly strong reasons for not compelling a widow to reside against her will with her husband's family. Her position there after her husband's death, if she is young, or without children, is sometimes a very unhappy one, and it is now settled that she does not forfeit her right to maintenance by quitting her husband's family, unless she do so for an immoral purpose.

There are cases in which a widow is able to carry her right further than a mere claim to maintenance, and I must explain how this arises.

If a man living under the *Dāyabhāga* law dies leaving no sons and a widow, the widow is his heir,<sup>1</sup> and no question of maintenance arises. But if he leaves a widow and male issue, the widow is excluded from the inheritance, and she has then a right to maintenance. Now the sons in this case will either be members of a new joint family if their father was single, or they will be members of the joint family to which their father belonged, if he was himself joint : in either case they may choose to have a partition, and should they do so, the widow would find a difficulty in enforcing the payment of her allowance. She therefore becomes entitled to what is called a 'share in lieu of maintenance', a share which is equal to that of a son.

<sup>1</sup> *Supra*, p. 58.

This itself may be called a liberal view of the widow's position, but the Dāyabhāga law goes still further. Even if the sons do not wish to divide, but the widow thinks that she is not as well treated as she ought to be, she may demand that a share of the same extent may be allotted to her, and if it is refused she may apply to the court to compel the sons to give it her; and, if the circumstances are such as to render it advisable, the claim will be enforced. The power thus put into the widow's hands is a very important one.

In the case of a widow whose husband was under the Mitāksharā law, and who at his death was separate, the law is substantially the same.

In a Mitāksharā joint family the widow is always excluded and always entitled to maintenance, but it is doubtful whether she could transform this into a claim for a share of the family property in lieu of maintenance.

## CHAPTER IX

### WOMAN'S PROPERTY

A WOMAN'S property may have been obtained by her by inheritance from a male, or by inheritance from a female, or by gift from her husband, or she may have obtained it in lieu of maintenance, or it may be property which she has earned by her own labour. These are not the only ways in which a woman may obtain property, but they are the most important for our present purpose.

The ownership by a woman of property which she has obtained in any of these ways, excepting what she has obtained by her own labour, is governed by a special set of rules. As to the ownership of property which she has obtained by her own labour, she is in the same position as any other person.

The property which a woman has obtained by her own labour is called her *stridhana*.

With regard to her *stridhana* the woman, being in the position of an ordinary owner, may deal with it as she pleases ; she may sell it or give it away ; if it is money she may spend it ; if it is a house she may live in it, or let it to a tenant ; at her death she may leave it by will to any one she may choose, and if she dies intestate it will go to her heirs.

But with regard to property which is not *stridhana*, a woman is in a very different position. She is, it is true, the owner of the property as long as she lives, and she has the full and exclusive enjoyment and management of it, but, in other respects, her ownership is a restricted one. She cannot give it away, nor can she sell it, except



under very special circumstances, and in cases of urgent necessity : neither can she dispose of it by will. Moreover, at her death it does not go to her heirs. Her ownership simply comes to an end, and the property goes, as it were, back from whence it came. If she obtained the property by inheritance from a male, it will go to the heirs of that male. If she obtained it on a partition in lieu of maintenance, it will be divided amongst the other sharers, as it would have been if she had never taken it. If she obtained it as a gift from her husband, it will revert to her husband or her husband's heirs. For example, A, the member of a joint family under the *Dāyabhāga*, dies leaving a widow and several brothers, but no sons. The widow is her husband's heir. But whether she remain joint with her husband's brothers, or whether there is a partition, whatever she obtains as heir to her husband is only hers to manage and enjoy. She cannot alienate it, and at her death it goes to her husband's brothers, not as *her* heirs, but as the heirs of her husband. The same rule would apply if A had left brothers and a daughter. The daughter, like the widow, could only hold and enjoy the property, but could not alienate it : and at the daughter's death it would go, not to her heirs, but to those of her father.

As regards the property which is *strīdhana*, there is no difference under the Hindu law between a single woman and a woman who is married. Of course, a wife is to some extent under the control of her husband in all her actions, and it is said that in case of extreme distress a husband may seize his wife's *strīdhana*. But in such cases the husband only exercises his personal authority ; the nature of the woman's ownership remains the same. The one peculiarity in *strīdhana* is that it descends to the woman's heirs, not according to the ordinary rules of succession, but according to a special set of rules applic-

able to *stridhana* only. I have said 'a special set of rules', but I ought to have said 'special sets of rules', for unfortunately the rules of inheritance of *stridhana* differ under different circumstances in a great variety of ways. They are different for different parts of India; they are different for different kinds of *stridhana*; they are different for a married woman and a virgin; and they are even different for women married according to different forms. Under these circumstances I shall not attempt to state the rules of inheritance for *stridhana*. I may, however, observe that they show, as might be expected, a marked preference for females as compared to males.

I will now state a few of the more important cases in which the Hindu lawyers differ as to what is *stridhana*. The Dāyabhāga lawyers allow the woman to claim as *stridhana* movable property given to her by (not inherited from) her husband, but not immovable property. Under the Mitāksharā the subject of *stridhana* has been thrown into confusion by passages in that commentary<sup>1</sup> which, if taken literally, would make all property which came to a woman in any way whatsoever *stridhana*. This view, however, has never been accepted, but as there is very little else upon the subject except these texts, the law is not easy to ascertain. The reason why the law of *stridhana* is so little referred to by the writers of the Mitāksharā school is that it has only to do with separate property. Under the Mitāksharā, women are altogether excluded from joint ownership; and separate property is, or at least has been, very unimportant. On the whole the tendency of the Mitāksharā lawyers of later times has been to treat as little property as possible as *stridhana*. I do not think that in any part of India

<sup>1</sup> The passages here referred to will be found in chap. ii. 5, 11; see Mayne's *Hindu Law*, sect. 523 sqq.

except one part of the Bombay Presidency a woman could claim as *stridhana* the immovable property which she has inherited from a male. There is more doubt about immovable property given to the woman by her husband, but the general opinion seems to be that this also is not *stridhana*. In Bombay and Madras it seems to be thought that movable property, however obtained by the woman, is *stridhana*; but elsewhere it is not so under the Mitāksharā. The district of Bombay which I referred to as exceptional is Gujerat, where the Vyavahāra Mayūkha is accepted in preference to the Mitāksharā. The Vyavahāra Mayūkha is an authority extremely favourable to women. Under it (as already stated <sup>1</sup>) the sister inherits the brother's separate property immediately after the paternal grandmother; and there is also strong authority in favour of the opinion that the property which has been so inherited is *stridhana*.

#### ALIENATION BY WOMEN

I mentioned above that though a woman could not alienate any property which was not her *stridhana*, yet that under certain circumstances she might do so. These circumstances have been a good deal discussed, and the discussion has been accompanied by a good deal of litigation; and therefore I consider this special power of alienation separately.

A woman can always alienate movable property even if it is not *stridhana*, if it would be otherwise wasted, as, for example, if more rice was in store than could be consumed; or more cattle on the land than could be fed. Immovable property and money invested in Government securities which are not *stridhana* can only be alienated by her in the following cases:—

1. Where a sale is necessary for the preservation of some

<sup>1</sup> *Supra*, p. 59.

part of the property itself. This may occur in three ways. Either the Government may be threatening to sell the land for revenue, or a landlord may be threatening to sell it for rent, or a creditor may be threatening to sell it to pay his debt. Such sales are generally very disastrous, and if there is no other way of meeting the demand, a portion of the property threatened sufficient for the purpose of protecting the remainder may be sold.

2. Where it is necessary to procure money for the performance of religious duties which it is strictly incumbent upon the woman to perform, and it is impossible in any other way to procure money for the purpose.

3. Where there is no other way of procuring the money necessary for the maintenance of those who are entitled to be maintained out of the property.

The first case is a pretty plain one; the last only applies to very small properties. The second case sometimes leads to disputes. A Hindu woman may be a widow at three or four years old: nevertheless she is condemned to a life of austerity, and is expected to occupy herself entirely with her religious duties. It is not surprising, therefore, that she tries sometimes to get a little amusement out of these; and a pilgrimage, or a *shraddh* at which a large number of persons are entertained, may be often a great relief to the monotony of a widow's life. It is quite possible, therefore, that she may think her income insufficient, whilst her husband's heirs, who take the property after her, may take very different views as to what religious duties are necessary and what are optional.

There is always some reluctance on the part of purchasers in purchasing from a woman property which is not *stridhana*. If a woman sells property, of course she cannot herself dispute the validity of the sale. And as no one else has any right in the property, no one can

dispute it at the time. But when the woman dies, then the next takers are very likely to dispute it: and to have to be always prepared for this contest, when perhaps the circumstances which occasioned the sale can no longer be easily proved, is very troublesome. Very often, therefore, the next takers are induced to join in the sale, and if they do so, then the sale can never be disputed. When I say the next takers, I mean the apparent next takers. It cannot be said who will actually take the property at the woman's decease, because it cannot be known who will survive her, but it can always be told who at any given moment are the persons who would take if she were removed, and the consent of these persons is sufficient to make the sale valid, whether they ultimately take or not.

The woman can, if she choose, spend the whole income of the property, even when it is not *stridhana*. Of course she ought to live in retirement, but there is no way of compelling her to do so, and no legal restriction upon the way in which she disposes of her income. If, however, she does not spend the whole of her income, there is some doubt as to what her position is with regard to her accumulations. Some persons think that they are not *stridhana*; others that they are: and the point is not yet settled. Something depends on the woman herself; for it is, at least, certain that if she signifies her intention that the accumulations should be added to the property from which they were derived, they will be so added, and will go with the rest of the property, and not to her own heirs.

## CHAPTER X

### MARRIAGE

I THINK it is desirable to preface my statement of the Hindu law relating to marriage by a short consideration of what is meant by marriage from a legal point of view. We have nothing to do here with the religious or the social aspect of marriage. Social habits and religious doctrines have had their effect in shaping the law of marriage, but the rules of law stand independent of the influences which brought them into existence. Marriage, considered as a legal institution, is a transaction between a man and a woman from which certain legal consequences result. When we say of a transaction that it constitutes a marriage, we mean that those consequences result from it.

The consequences which result from a marriage are (1) that the man and the woman stand in a special kind of legal relationship to each other; (2), that they stand in a special kind of legal relationship to their issue; and (3), that they stand in a special kind of legal relationship to the kindred of each other. These relationships are expressed by the terms husband and wife; parent and child; father-in-law and son-in-law or daughter-in-law, and so forth.

Sexual intercourse, without marriage, may produce, and generally does produce, some rights and duties. Thus sexual intercourse, if fruitful, always produces, in some sense, the relation of parent and child. Issue of a marriage we call legitimate; issue of sexual intercourse without a marriage we call illegitimate. When a child

is spoken of, a legitimate child is always meant, unless the contrary is expressed.

In early times, the only condition necessary to a marriage was that a man should have got possession of a woman with the intention of making her his wife. The means by which he got possession of her, as well as her consent to the union, were immaterial. The eight forms of marriage enumerated in the Laws of Manu<sup>1</sup> enumerate the different ways in which the man may get possession of the woman. Each mode is called by a separate name, showing that each had at one time been common, though probably some were even then becoming obsolete. We find there mentioned four kinds of gifts of a woman by her father, which are called respectively Brahma, Daiva, Arsha, and Prajiapatya, according to the circumstances under which they are made. The sale of the daughter is called Amra. What we should call the marriage of inclination is denominated Gandharva. Ravishment is called Racshasa. Getting possession of a woman by fraud is called Paisacha. But the Brahma form was already the most respectable, and all the others are now obsolete, at least amongst orthodox Hindus, or nearly so. It is simply the free gift of a daughter by the father to the future husband without any bargain or recompense. Even at the date of the Laws of Manu, the sale of a daughter was stigmatized in the strongest terms as disgraceful. But the Amra form of marriage has never been declared to be invalid. Nor would it be so now. In fact, our courts would approach the matter in a somewhat different way. They would look to see if there was a valid legal transfer of the girl to the husband. If there was, no inquiry would be made whether any inducement were offered to the father.

<sup>1</sup> Chap. iii, v. 21.

The transaction takes place entirely between the father of the girl and the future husband : the girl has nothing to do but to obey. If the girl has no father, then the transaction takes place between her brother or other nearest male relative and the future husband. If, however, the girl is not married when she attains puberty (which is very rare), then she may choose a husband for herself.

The father certainly cannot dispose of his son in marriage as he can dispose of his daughter ; nor is anything said about his consent in the matter ; though in the case of a very young boy, I imagine that his consent would be required. The marriage of mere boys with the father's consent is very common, and is certainly valid.

The ceremonies which precede and accompany a marriage are very numerous, but they are by no means all of them essential to a marriage. By far the most important is that which consists in the bridegroom taking the bride's hand and walking with her seven steps.<sup>1</sup> Amongst Hindus generally the performance of this ceremony following upon a betrothal would be treated as conclusive evidence of a marriage, whilst the omission or non-completion of it would, I believe, amongst orthodox Hindus be conclusive that no marriage had taken place. But still any particular customs of the tribe or caste to which the parties belonged would always be considered, and it cannot be said that the ceremony of the seven steps is a universal condition of marriage, or is universally conclusive as to the existence of a marriage. There may be communities of Hindus which require something more, and others which require something less, and others again which require something altogether different. I have reason to believe that in some parts of India the only solemnity which accompanies a

<sup>1</sup> See Colebrooke's *Essays*, vol. ii, p. 231.



marriage is giving a feast to which the members of the two families are invited.

A marriage of Hindus is complete without consummation. And as girls are married before the age of puberty, consummation is generally deferred, sometimes for several years. But all this time the parties are husband and wife. If the husband dies, the child becomes a widow, and the condition of these child-widows in India is sometimes very pitiable. Practically they can only very rarely hope to marry again. Whether the second marriage would be lawful, was a doubtful point under Hindu law, but that was settled by Act XV of 1860, which declared the widow's capacity to marry. The social prejudice, however, against the remarriage of widows is still strong; and, most unfortunately, the concession was made when passing Act XV of 1860 of depriving the widow of any property inherited by her from her husband, thus adding a fresh stigma to such marriages.

There is no legal restraint upon the number of times that a Hindu man may marry, nor upon the number of wives that he may have at one time. But polygamy is not practised nearly so largely as is commonly supposed: indeed I believe it to be rare unless the first wife prove to be childless, in which case it is considered to be without reproach.

Members of the three higher castes cannot marry a woman of the same *gotra*. A *gotra* is literally an enclosure for cattle; but a prohibition against marrying a girl belonging to your own cattle-yard, which was significant enough in former times, would not now have any meaning. Baboo Gooroo Dass Banerjee, a learned Brahmin, and one of the judges in the High Court at Calcutta, in a very interesting course of lectures upon the Hindu law of marriage, translates *gotra* by the words

'primitive stock', and states that 'in order that two persons may be of the same *gotra* each of them must be descended from the same patriarch through an uninterrupted line of males'.<sup>1</sup> This rule is said not to apply to Sudras. But the Baboo goes on to give another rule which is applicable to all Hindus, and which prohibits the marriage of a man with a girl descended from his paternal or maternal ancestors within the sixth degree. The result is to give a wide rule of exclusion of both agnates and cognates applicable to all Hindus. The exception, however, is made that if a fit match cannot otherwise be procured, a man may marry a girl within the fifth degree on the father's side and the third on the mother's. This is a very important exception, because it would be very difficult indeed to refuse in any case to recognize the validity of such a marriage. A court could hardly say after the event that any other 'fit match' was available to the husband. In other words, this exception practically reduces the legal limit of prohibition: and so Baboo Shama Chun Sircar, another learned Hindu who has written on the subject, seems to understand.

A Hindu must also marry within his own caste; that is to say, a Brahmin must marry a Brahmin, a Rajpoot must marry a Rajpoot, a Sudra must marry a Sudra, and so forth. Whether there are any other representatives of the four original castes is very doubtful; and even the claim of the Rajpoots to represent Kshetriyas is disputed. But there are innumerable subdivisions of Hindus into smaller classes which are called castes, and as a matter of fact these minor castes do not usually intermarry. How far such marriages would be lawful it is difficult to say. The matter is entirely one of custom. The ancient Hindu law fur-

<sup>1</sup> *Tagore Lectures*, 1878, p. 58.

nishes no rule on the subject, because under the ancient law intermarriages between persons of different castes, though strongly disapproved, were not pronounced to be illegal, though they were reprobated as discreditable. Modern Hindus seem disposed to deny the validity of marriages between members of different subdivisions of the four great castes. Possibly the courts of law would consider the matter to be regulated by custom.

## DIVORCE

The question whether a wife can be divorced by her husband under the Hindu law has been a good deal debated. The real question is, I think, rather a narrow one.

It is clear that the unchastity of a wife deprives her of all her rights in regard to her husband whatsoever, except to a bare maintenance, and even of this, if she be actually living in adultery. If she is unchaste, she cannot succeed to her husband as his heir, nor can she claim anything out of his property. But it does not follow that the marriage tie is thereby dissolved, nor would there be much object in dissolving it. The only object of a divorce would be to deprive a woman of her rights as a wife, and to enable her to marry again. But she is deprived of her rights, as far as it is possible to deprive her of them, without a divorce; and even a divorced woman (if such a thing were possible) under Hindu law could not remarry, and she could claim maintenance. Hindus sometimes do go through a private ceremony of repudiation which is called a divorce, but this is only done by the husband in order more effectually to relieve himself of his duties in regard to her, and to deprive her of all claims upon him or to his property except maintenance. Some of the lower castes, however, are said to allow a husband thus to divorce his wife, and to allow her in such a case

to remarry ; and if such a custom were clearly proved it might be difficult to deny the validity of the proceeding.

The single case in which a dissolution of a Hindu marriage can be granted by a court of law is under Act XXI of 1860, which was passed to meet the difficulties which arise when one of the parties to a marriage becomes a Christian. In this case if the convert, after deliberation during a prescribed time, refuse to cohabit any longer with the other party, the court may declare the marriage to be dissolved, and a woman whose marriage is thus dissolved is declared capable of marrying again.

#### SUTTEE

The practice which we call 'suttee'<sup>1</sup> is the voluntary burning of herself by a widow together with her husband, when, as is customary with Hindus, his body is burnt. According to Hindu ideas, this is (or was) a laudable act of devotion on the part of the widow, and when we first came into the country it was not uncommon. Of course, British officers did what they could to discourage the practice, and especially to prevent any pressure being put upon the widow. They also took advantage of any circumstances which would render the case an improper one for the performance of the sacrifice, as, for example, that the burning did not take place *with* that of the body of her husband. But if the case was one in which the established Hindu law recognized the propriety of the sacrifice, it would have been contrary to the general principles on which we acted to treat it as otherwise than a lawful act.

In order to prevent any widow being burnt otherwise

<sup>1</sup> The Sanskrit word 'sati' signifies 'a virtuous wife', particularly one who performs the duty of sacrificing herself on the funeral pile of her husband. We have transferred the word from the woman who performs the sacrifice to the sacrifice itself.

than in strict accordance with the Hindu law, it became the practice for the magistrate to attend the ceremony, and to prevent it taking place, if he found anything which would justify his interference, but this method of proceeding necessarily gave a sort of sanction to the sacrifice which was not altogether satisfactory, and it is even said that for a time the number of cases of suttee increased under our rule. At length, by Reg. XVII of 1829, the act of a widow burning herself was declared to be an offence. The attempt to perform the sacrifice was, therefore, likewise an offence ; as was also assisting in the performance. Magistrates and police officers were also at once enabled to interfere to prevent it. The event showed that Hindu opinion on this subject had by this time a good deal changed. The measure produced no serious disturbance, and from this time suttee has entirely disappeared in that part of India which is under British rule.

Under the Penal Code suttee would be suicide, and the attempt to commit the offence and the abetment of it would be punishable accordingly.

## CHAPTER XI

### FATHER AND SON

It has been stated by an English author that under the Hindu law 'sonship and marriage stand in no relation to each other'; and the same author states, as his own opinion, that the notion of sonship is founded on that of ownership: ownership of the mother and ownership of the child.<sup>1</sup> This view is supported by arguments which are plausible, but which, notwithstanding the great authority of the writer, I venture to think fallacious. The rights of a father over his son, like the rights of a husband over his wife, are rights available, not against a particular person only, but against all the world, as the saying is. They are available generally against any person who infringes them. They are what we call rights *in rem*, in contradistinction to rights *in personam*. In this respect they are like rights of ownership which are similarly available. But it is contrary to established usage and would, I think, create the greatest confusion to speak of rights over a free person as rights of ownership. Unless we are prepared to say that the wife and the child are slaves of the father, we cannot base the rights of the father over the wife and son as ownership.

It is undoubtedly true (and this is relied upon in support of the statement that sonship has nothing to do with marriage) that there are methods of acquiring sons otherwise than by marriage which are known to the Hindu law. But it must be remembered that these

<sup>1</sup> Mayne, *Hindu Law*, s. 62.

contrivances can only be resorted to when there is no son by marriage, and as a last resource, and that a fiction is resorted to in order to cover the anomalous nature of the contrivance.

There were at one time more contrivances than there are now for supplying the want of male issue by marriage. At one time a son could be begotten for a man who was dead by the cohabitation of his widow with his brother, and even by her cohabitation with a stranger. This has been looked upon as a survival of polyandry.<sup>1</sup> But these contrivances, though still known and admitted as valid at the date of the Laws of Manu, are now entirely obsolete. I have also already alluded to the custom which once prevailed of an appointment of a daughter by the father to produce male issue for him. This is also now obsolete. The head of a family could also, if he had no son born in wedlock, accept as his own any child born in his house, whose mother was either not known or not married. So he could accept as his own the son of his wife born or conceived before marriage, or the son of his concubine. In the three last-mentioned cases he may be and probably would be himself the father of the child whom he accepted as a son. But these contrivances are not now in use. The only contrivance now in use for procuring a son in the absence of male issue born in wedlock is taking as a son the son of another man who is willing to part with him. This is called adoption.

There were originally seven kinds of adopted sons : there are now only two, the one is called *dattaka* and the other *kritrima*. The *dattaka* form is in use over all India : the *kritrima* form is in use only in the district of Mithilā.

A man can only adopt who is without issue, capable

<sup>1</sup> But see Mayne, *Hindu Law and Usage*, s. 65 sqq.

of inheriting his property and performing the funeral ceremonies for himself and making the necessary offerings to his ancestors.

A woman cannot adopt. But by the authority of her husband, and as his agent, she may select a son and perform the act of adoption on behalf of her husband.

A man can adopt a son without his wife's assent, notwithstanding that the child, when adopted, becomes the child of both parents.

The Hindus consider it a grievous misfortune that the line of male descent should be broken. The due performance of the sacrificial offerings to the dead ancestors is thereby interrupted. This explains the great latitude given to the widow to adopt a son on behalf of her husband in case he has omitted to do so himself. All Hindus accept as authoritative the text of Vanishta, which says, 'Nor let a woman give or accept a son unless with the assent of her lord.' But the lawyers of Western India do not consider that any express permission to adopt is required by a widow who wishes to adopt after her husband's death. She is presumed to have that permission. In Southern India also the widow may adopt without express permission, but the *sapindas* must give their sanction to make the adoption valid. The Dāya-bhāga lawyers give to the words their natural interpretation: and the Benares lawyers do the same, namely, that the husband must expressly authorize the woman to adopt to make the adoption valid.

The authority to adopt is subject to the same general rules as apply generally to authorities of the kind. No particular form of authority is required, but the directions of the giver of the authority must be strictly followed. Thus if a direction be given to adopt a particular boy, that boy must be adopted. Authority may be given to a minor to make an adoption.



The alleged incapacity of an unchaste widow to act as agent for her husband in making an adoption seems to rest entirely upon her incapacity to perform any religious acts. The real question, therefore, is whether any religious act is necessary to the adoption, a question which I shall consider presently.

The only person to whom an authority to adopt can be given is a wife or widow: and no widow can be compelled to exercise her power of adoption if she does not wish to do so.

The father has absolute power to give away his son in adoption even without the consent of his wife. But her consent is generally asked and obtained before the son is given. After the father's death the widow may give a son in adoption.

In the case of an adoption by a Ward of the Court of Wards, the consent of the Board of Revenue is necessary.

The rule which, in former times, rendered it necessary that the nearest male *sapinda* should be adopted is obsolete, and the adoption of a stranger is valid, although nearer relatives otherwise suitable are in existence.

A man may adopt any child whose mother he could have married if she had been single: if he could not have married the mother, even if single, then he cannot adopt her child. The reason given in the text is that the adopted child must bear the resemblance or reflection of a son.<sup>1</sup>

The adopted son and the adopting father must be of the same caste.

The period fixed for adoption is prior to the *upanayana* or investiture of the child with the thread. For Sudras who have no thread the period is prior to marriage of the child.

<sup>1</sup> So in the Roman law it is said 'adoptio naturam imitatur', Justinian's *Institutes*, i. 11. 4.

An only son may be adopted : this has been the subject of great contention, but the Privy Council has at length decided in favour of the adoption. But for a Hindu to give away his only son, is altogether contrary to the spirit of Hinduism.

Of course, therefore, an eldest son, or one of two sons, may be adopted : though even this was at one time doubtful, and it would be considered discreditable on the part of the father to give either one or the other in adoption, as the eldest son is the father's truest representative, and it is perilous for a man to leave himself with only one son, who might die and leave him sonless.

The objection to adopting an only son does not apply when the adopted son thereby becomes what is called a *Dvyāmashyāyana*, or son of two fathers. Generally the adopted son leaves entirely the family of his natural father and enters that of his adopting father. But if a man adopt his brother's son there is no change of family. Exactly the same offerings are due from the adopted son before as after the adoption. The boy is, therefore, called 'son of two fathers'; and whether he is an only son or not makes no difference.

To constitute an adoption there must be an act of giving and an act of receiving : and these acts must be performed with the intention of finally accepting the child on the one hand and of giving it up on the other. For Sudras no other form or ceremony is required by law than this. For the twice-born classes it is still doubtful whether any religious ceremony is required. But it is very unlikely that in any class religious ceremonies would be omitted, and if none have been performed there would be strong cause to suspect that the adoption, though it may have been contemplated, had not been finally completed.

If an adoption were in itself invalid, no acquiescence

and no lapse of time could make it valid ; just as an invalid marriage could not be similarly validated. But acquiescence by the family would be strong evidence in favour of the validity of an adoption if it were impeached. And the rules of limitation in force in India might in time, by barring every suit in which the question could be raised, practically render the adoption legally unimpeachable.

#### GUARDIANSHIP

There is a quaint notion in the English law that the guardianship of every child is vested in the king as *parens patriae*, and that this guardianship is deputed by him to the relatives of the child. So far as this notion is not purely fanciful it is probably feudal, and nothing of this sort is known to the Hindu law. In India, as in other countries where the feudal law has not prevailed, guardianship is closely connected with the customs of the family. In early times, so long as the family remained united and the common ancestor was alive, no question of guardianship arose, because the head of the family, whether the natural head or the elected head, would have the general care of all the members of it. But when, after the death of the common ancestor, there is only a *kurta* or manager, the guardianship of infants after the death of their father has to be provided for.

Under Hindu law the mother, after the death of the father, is the natural guardian of her children. By natural guardian is meant that she is guardian *ipso facto* as soon as the father dies, without the direction or appointment of any one. It is quite intelligible that she should be so, because the mother, according to the most ancient theory of Hindu law, takes the place of her husband and carries on the family.

In default of the father and the mother the guardianship falls to the nearest male agnate, who is himself of

age, who is also, as I conceive, natural guardian ; that is, he derives the guardianship, like the mother, simply from his position in the family, and not from any external source. In the entire absence of male agnates it is said that the relatives through the mother can claim the guardianship. It may be so, but I do not know upon what grounds their right to the guardianship is placed.

A Hindu father can always appoint a guardian for his children. No relative except a father can appoint a guardian.

The courts of justice have also power to appoint guardians under various legislative provisions made by the British Government.

A very important jurisdiction over minors is also exercised by the Courts of Wards, of which there is one in each province. The Court of Wards only acts where the minor has an estate paying revenue to Government, and the main object of the Court of Wards is to secure the payment of the revenue. The court, however, also takes charge of the minor, and looks after his education.

A guardian may always be removed for misconduct.

There has been a good deal of discussion as to the consequences of a change of religion, either on the part of a guardian or his minor. It used to be thought that if a Hindu child could be induced to be baptized, his Hindu guardian, and even his parents, lost all power over him. This monstrous notion has, however, been completely overruled. So, too, a change of religion on the part of the father has no effect upon his control over his children. But it is the duty of a guardian to bring up a child in the religion of its father, and, therefore, if an appointed guardian changes his religion he might be, and I think would be, considered as disqualified.

## MINORITY

There has been some difference between Hindu lawyers as to the age at which a male should be considered to attain full capacity. The Bengal lawyers placed it at fifteen : the Mitāksharā lawyers at sixteen. It has, however, now been fixed by Act IX of 1875 at eighteen for Hindus in general, and for Hindus who are in the charge of the Court of Wards at twenty-one.

## CHAPTER XII

### RELIGIOUS ENDOWMENTS

THE Hindu law, like the English law, recognizes the appropriation of any kind of wealth to objects of religion and charity, and this is a portion of the Hindu law which, under arrangements mentioned above, the British Government is bound to enforce.<sup>1</sup>

There are, however, well-known abuses which are always liable to arise in connexion with dispositions of property for religious and charitable purposes—which for brevity's sake we may call 'endowments'—and in England and generally in Europe, these endowments are put under somewhat severe restrictions.

The Hindu law recognizes a class of endowments unknown in Europe. Besides the idols which are objects of worship for all Hindus, or at least for all the members of a particular sect, there are idols which are objects of worship for the members of a particular family only. This kind of endowment has been found specially difficult to deal with.

There are two ways in which an endowment may be created in India. The property may be given directly to an idol whose worship and dignity is to be preserved ; or it may be given to an individual, with a direction to him to apply the property to the religious purposes indicated.

There is nothing which we need consider either impossible or absurd in giving property to an idol. Gifts to the Deity, and to Jesus Christ, and to dead saints, were very common in the Middle Ages. And,

<sup>1</sup> *Supra.* p. 7.

after all, an idol is as much a real person as a corporation. In this case it is, of course, necessary that some arrangement should be made for the management of the property.

The other way of creating an endowment is by giving the property to a person or body of persons, with directions as to the objects to which the property should be applied.

The procedure by which the fulfilment of the duties imposed upon the persons responsible for the management of the property is to be enforced, was originally created by Reg. XIX of 1810. By that Regulation the general superintendence of endowments was placed in the hands of the Boards of Revenue, subject to an appeal to the courts of law, if any person conceived himself to be injured by the orders of the Revenue officers. But this Regulation, so far as it related to endowments, was repealed by Act XX of 1863, which applies to India generally, and by s. 14 of that Act the jurisdiction to inquire into and prevent breaches of trust by persons responsible for the management of endowments is placed entirely in the hands of the Civil Court.

When the property is given to an idol, the person who manages the property is called a *shebait*. The mode in which the successive *shebait*s are to be appointed should be provided for by the founder of the endowment. If not provided for, the appointment would probably be considered to belong to the family which worshipped the idol, or, in the case of a public idol, to the family of the founder of the endowment. But, in case of doubt, the courts would look to see who was in possession of the property, and if that person had assumed to act as manager, would hold him responsible, whether in strictness he were so or not.

The manager of an endowment must apply the property belonging to the endowment strictly in accordance with

the directions of the founder, and manage it in the same way as a prudent owner would manage it. He cannot, as a rule, alienate the property of the endowment, though he might sell the crops grown on the land of the endowment, and apply the proceeds to the purposes of the endowment.

It sometimes occurs that owners of property declare in a vague sort of way that all their property is to be devoted to religious purposes, and these, too, are vaguely defined. And as the persons appointed to manage the property are not unfrequently members of the founder's own family, and moreover, as no one outside the family is interested in inquiring how the property is managed, there is obviously some temptation to create sham endowments. As has been just now stated, the property of the endowment cannot be alienated; virtually, therefore, the property must for ever continue to belong to the family in perpetuity. Nor can the property of the endowment be seized by a creditor for the debts incurred by the family, or by the manager of the endowment on his own account. It is, therefore, necessary to inquire, where there is any suspicion to the contrary, whether the endowment is a real and complete one, or only made for the purpose of obtaining the special protection which endowments enjoy. And further, the courts will look to see whether, after fully satisfying all the objects of the endowment as declared by the founder, there is any surplus, and if there is such a surplus, it will be subject to the ordinary law, so that it may be seized and sold by a creditor for a debt incurred by the person to whom it belongs.



## CHAPTER XIII

### BENAMI TRANSACTIONS

WHAT are called benami transactions occupy a large share of the attention of the courts in India. The word 'benami' literally means 'without a name', but it is applied to transactions in which names are given, though not the real names, of the parties concerned. The names used are generally those of a wife, or a servant, or a child. For example, A, a Hindu, buys an estate, but he takes a conveyance, not in his own name, but in that of his servant B. B thus appears upon the documents as the owner of the estate; the receipts for rent are granted in his name; and if an action is brought having reference to the estate, it is brought in the name of B. Nevertheless B only does what A tells him. A takes all the profits, and is the real owner.

Benami transactions have very often been characterized as altogether fraudulent. I do not think that they are by any means universally so. The practice of using fictitious names has, I believe, arisen partly from superstition—some persons and some names being considered as lucky, and others as unlucky. Partly also the practice is due to a desire to conceal family affairs from public observation; a desire which is almost universal, and of which the history of our own law furnishes many examples. But many benami transactions originate in fraud; and many of those which did not so originate are made use of for a fraudulent purpose; more especially for the purpose of keeping out creditors, who are told, when they come to execute a decree, that the estate

belongs to the fictitious owner, and cannot be seized. It is not common for people's wives, and servants, and children, to have acquired large properties, whilst they themselves are penniless, and such stories always arouse suspicion. But it is difficult to disprove them; whilst the documents relating to the property, and all the transactions concerning it, seem to support the assertion. The real test is always said to be to inquire where the money came from to purchase the estate, but this is not an easy matter to ascertain.

Of course the real owner is a good deal at the mercy of the fictitious owner in these transactions, if the latter chooses to say that he is himself the real owner, and a great deal of litigation arises in India by disputes as to who is the real owner of property. The fictitious owner will sometimes sell the property and pocket the money; and it may very well happen that the purchaser in such a case had every reason to believe that he was dealing with the true owner, all the *indicia* of property being in the hands of the fictitious owner. It would be very hard if, in case he were sued by the real owner, the purchaser were to suffer, considering that the person claiming against him was the very person who enabled the seller to commit the fraud. It has, therefore, been decided that, if it is clear that the purchaser acted in good faith, and with no reason to doubt that he was dealing with the real owner, the purchase must stand good, and the real owner must get what satisfaction he can out of the fictitious owner.

The principle on which the Indian courts will deal with a benami transaction is, that effect will be given to the real and not to the nominal title, unless the result of so doing would be to violate the provisions of a statute or to work a fraud upon innocent persons, e.g. the real owner may sue the ostensible owner to

recover possession. Creditors enforcing claims against a real owner will have the same rights against his property held benami, as if it were held in his name.

Statutes provide that in sales under decree of court or for arrears of revenue, the certified purchaser shall be conclusively deemed the real purchaser.



# **THE MAHOMMEDAN LAW**



## CHAPTER I

### THE SOURCES OF MAHOMMEDAN LAW

I HAVE explained in the Introduction how it was that we came to administer Mahommedan law in India. The root of that administration, like that of the Hindu law, lies in the Regulation promulgated by Warren Hastings in the year 1772, by which it is directed that 'in all suits regarding inheritance, marriage, caste, and other religious usages and institutions the laws of the Koran with respect to Mahommedans . . . shall be invariably adhered to'.<sup>1</sup>

The Mahommedan law as compared with the Hindu law is a modern system. Though, as I shall show hereafter, there are portions of the Mahommedan law of a much older date, the basis of the Mahommedan law is the Koran, which belongs to the seventh century of our era, and this, compared to the sources of Hindu law, is quite a recent date. Nor do we find in the Mahommedan law any of those survivals of archaic law which we meet with in Hindu law; the joint family is unknown; sacrificial offerings to the dead are never mentioned, and are repugnant to the whole Mahommedan system which is purely monotheistic; the testamentary power is well established.

In theory the Mahommedan law, as laid down by the Prophet, is divine and immutable. And although this theory as to the divine nature of law is held by Mahommedans in common with Hindus, yet the influence of the theory is much greater in Mahommedan law than

<sup>1</sup> *Supra*, p. 7.

in Hindu law. This has arisen partly from the origin of the Mahommedan law being so recent, and its precepts being so precise, and partly from the unity of the Mahommedan faith as regards all its main doctrines.

That the law has stood still since the days of the Prophet, not even the most orthodox Mahommedan would assert. But every effort that is possible has been made to conceal the extent to which this change has taken place; and to prevent its going further. Moreover, there are certain subjects which orthodox Mahommedans assert that no legislation can touch, namely, family affairs, marriage, divorce, and inheritance.<sup>1</sup>

The Koran is supposed to contain an exact record of those sayings of the Prophet, which he himself announced as divinely inspired. They were not collected or written down by the Prophet himself, but by his companions immediately after his death.

The Koran, however, though by far the most important, is not the sole source of Mahommedan law. Besides those utterances which Mahommed himself announced as the inspired message of God, whatever he was supposed to have *said*, or whatever he was supposed to have *done*, was looked up to as precept and example. It was thought impossible to attribute the ordinary errors and weaknesses of humanity to the chosen Prophet of God; or to suppose that he was ever wholly uninfluenced by the divine wisdom. A collection therefore was formed of these sayings and doings, as narrated by those who were his actual companions. The name of this collection, as given by modern writers, is somewhat uncertain. The proper term for it, I think, is *Sunnah* and *Hadis*; the former being the tradition of what the Prophet did, and

<sup>1</sup> Some very interesting observations on the attitude assumed by Mahommedans in regard to changes in their law will be found in Young's *Corps de Droit Ottoman*, in the first pages of the Introduction.



the latter of what he said. There is no record, however, of the Sunnah and Hadis of the same exclusive authority as the Koran.

Besides the Koran, and the Sunnah and Hadis, Mahommedans generally accept the Ijmaa and the Kiyas. The Ijmaa is a body of decisions upon disputed points supposed to have been pronounced by those who were the actual companions of the Prophet. Some sects, however, do not confine the Ijmaa to these decisions, but include in it the opinions of other learned and venerated persons who lived after the Prophet. The Kiyas is a collection of rules or principles deducible by the methods of interpretation and analogy from the other three sources.

The authority of these four sources of the Mahommedan law stands in the order in which I have named them. First the Koran, then the Sunnah and Hadis, then the Ijmaa, and then the Kiyas.

Great pains were taken to secure that there should be no dispute as to the authenticity of the text of the Koran; and these efforts were so successful that there never has been but one version of the Koran. But there is not the same certainty as to the text of the other law sources. Of these there are several versions, and with all their fidelity to the Koran the Mahommedans have not escaped violent differences of doctrine, which have ended in breaking them up into sects. There are said to be as many as seventy-eight of these sects, though some of them cannot be very numerous.

There is, however, a division amongst Mahommedans much more important than any of these, and which did not spring originally out of differences of legal or religious doctrine. Every Mahommedan, besides belonging to some particular sect, is also either a Sunni or a Shiah. Now this great division of Mahommedans was caused by a

dispute which in its origin was wholly political ; though, as might be expected, doctrinal disputes have grown up with it, and it is doctrinal disputes alone which now keep it alive. The Shiahhs and the Sunnis represent the two parties into which Mahommedans were divided, in consequence of the quarrel which arose as to the succession to the Caliphate, after the death of the Prophet. Mahommed, having left no male issue, two claimants came forward to succeed him : Ali, who married his daughter Fatima, and Abu Bakr, his father-in-law. Both apparently based their claims upon the same ground. Each claimed to be the head of the family to which Mahommed belonged, and, as such, entitled to succeed to the sovereignty. There seems no doubt that both these persons did belong to the same family as the Prophet, though which had the better claim to be the head of the family we have no means of judging. After some vicissitudes, and much bloodshed, ending with a massacre of the descendants of Ali by Yazid, who represented the rival line of Abu Bakr, the victory remained with the latter. But a considerable section of Mahommedans still refused to acknowledge a descendant of Abu Bakr as their legitimate sovereign, and it is this section of Mahommedans who are now represented by the Shiahhs, though, of course, as I have said, the dynastic quarrel has long ago been dead. The victorious party in the dispute are represented by the Sunnis.

There is said to have been at one time a considerable number of Mahommedans who were neither Sunnis nor Shiahhs. I am not sure whether this is correct. If there are any now who are not either one or the other, they are very few in number, at least in India, and of no importance for our present purpose.

The Mahommedans of India are generally Sunnis. There are a few Shiah families, mostly of Persian descent ;

the Persians being generally Shiah. The most important Shiah family in India were the Nawabs of Oudh, who were of Persian origin, and retained their national religion. So long, however, as they owed allegiance to the Emperor of Delhi, who was a Mogul and a Sunni, they made no attempt to impose the Shiah doctrines upon the people. But when the Nawab in the year 1818 threw off entirely his allegiance to the Emperor, and called himself king, he compelled the Mahommedans in Oudh to become Shiahs, so that by the time that we came into possession of that part of India, the Shiah law was being administered there. In Oudh, therefore, the Shiah law is the rule, and not, as in the rest of India, the exception.

The Arabic treatises on Mahommedan law which are generally made use of by our judges in India are the Koran itself, the Hedaya, the Futwa Alumgiri, and the Sirajiyah. The Hedaya was composed about A.D. 1150. It was translated from Arabic into Persian by a native of India, and afterwards from Persian into English by Mr. Hamilton. The result is said not to be very satisfactory. The Futwa Alumgiri has not been fully translated, but it has been made the foundation of a treatise on Mahommedan law by Mr. Neil Baillie. The Futwa Alumgiri was drawn up by order of the Emperor Aurungzeeb Alumgeer, in the latter half of the seventeenth century. The Sirajiyah, of which the date is unknown, was translated by Sir William Jones.

It remains to say a word about legislation. There has been, of course, as already pointed out, a vast amount of legislation in India of a territorial character which necessarily, therefore, affects Mahommedans: but those portions of the Mahommedan law which were reserved to them by the Regulation of Warren Hastings have scarcely been touched by legislation. These are the

portions of their law which Mahommedans hold to be most sacred; and any interference with which by the Legislature they would undoubtedly resent.<sup>1</sup>

<sup>1</sup> Practically the result arrived at corresponds almost exactly with that arrived at in Turkey and other Mahommedan countries: namely, that whilst the law relating to the family and to inheritance has remained undisturbed, there has been upon other subjects some considerable legislation, distasteful as this has been to the orthodox lawyers. See Young, *Corps de Droit Ottoman*, Introduction, p. ix note.

## CHAPTER II

### THE LAW OF SUCCESSION TO PROPERTY: TESTAMENTARY SUCCESSION

AT first sight there appears to be the strongest possible contrast between the origin of the Mahommedan law and that of the Hindu law as regards succession to property. The Hindu law of succession begins, as one may say, nowhere. Its origin is lost in obscurity, and it has been gradually developed by the modification of the joint family, from which it is not as yet completely separated. The Mahommedan law seems to begin with a few dry precepts in the Koran, not very unlike those which might be found in an Act of Parliament.<sup>1</sup> Yet even in the Mahommedan law we find traces of an earlier stage which bears a strong resemblance to the more primitive forms of succession which we meet with nearly everywhere, both in Europe and in India. This I shall examine presently.

Under the Mahommedan law the power of a man to dispose of his property by will is and always has been recognized, but this power is not unlimited.<sup>2</sup> One limitation is that whatever a Mahommedan disposes of by will must be given to a stranger. A bequest to an heir is void. A second limitation is that the portion of the property disposed of by will must not exceed one-third of

<sup>1</sup> *Sacred Books of the East*, vol. vi, chap. iv; Sale's *Koran*, Sura iv. 8, 16.

<sup>2</sup> In chap. v, verse 105 of the Koran a word occurs which is translated by 'will', but it may be that what is here referred to is a death-bed gift. It is not unlikely that the law relating to wills was to some extent borrowed from, and developed under the influence of, the Roman law, with which the Mahommedan lawyers must have come into contact in Spain and elsewhere.

the whole estate, after paying the debts and funeral expenses. The rule that a man cannot make a bequest to his heir is peculiar to the Mahommedan law. The other rule, restricting the power of disposition to a portion of his property, is a very usual one. We find a similar restriction in the Roman law, the French law, and the law of most continental countries in Europe. It is, in fact, the general rule that the heirs may claim their *pars legitima*. The rule in England that a man may totally disinherit his own relations is peculiar.

A bequest which would be otherwise invalid as exceeding the testamentary power is rendered valid by the assent of the heirs.<sup>1</sup>

If a Mahommedan dies leaving a will, first, the debts and funeral expenses must be paid, and then the bequests, or legacies as they are called, so far as they are valid. The residue is then divided amongst the heirs.

A Mahommedan may appoint a person to administer his estate after his death. The person so appointed is called a *wasi*, which is generally translated by the English word executor. An executor, however, is not the same as a *wasi*. The *wasi*, it is true, like the executor, gets in what is due to the estate, pays off the creditors, and generally winds up the affairs and distributes the surplus. But he is only a manager. He does not become the owner of the property at any time, whereas the property actually vests in the executor; nor does the *wasi* represent the deceased: he represents those who are beneficially interested in the estate.

There is no restriction as to the form of a testamentary disposition under the Mahommedan law. It is not even necessary that it should be in writing. Provided that

<sup>1</sup> Nevertheless the transaction retains its testamentary character, and the legatee derives his title from the testator, and not from the heirs.

not more than one-third of the property is disposed of, the disposition will be valid in whatever way it may be expressed. If the one-third is exceeded, each legatee must abate a proportion of his legacy.

I have now to deal with certain dispositions of property made in contemplation of death, but not made by will. A will is essentially a disposition of property which is revocable. In this respect it differs from a gift, which, when complete, is not generally revocable, though it may be so under certain circumstances. The restrictions applicable to wills, therefore, would not apply to gifts, even when made in contemplation of death, and a man about to die might give away his property as he pleased. When people are in health they are not generally over-anxious to get rid of their property. But when they feel the approach of death they are much more inclined to do so. Unless, therefore, some restriction were put upon death-bed dispositions of property, not only heirs at law would be disappointed of what the Mahommedan law considers to be their just expectations, but creditors might be defrauded of their rights.

The Mahommedan law, therefore, contains some very simple and wise provisions for preventing reckless or unjust dispositions of property made on the approach of death. In the first place, a man who is 'sick' can only dispose of one-third of his property by gift, so that in this respect he is in the same position as if he were making a will. I have used the expression 'a man who is sick', because that is the word generally used by writers on Mahommedan law, but really the prohibition only applies where the donor is 'sick unto death'. If he recovers, the gift is good, whether or no it exceeds the one-third. There was formerly also a rule restricting a sick man's power to enfranchise his slaves, which, so long as slavery was lawful, was necessary, because enfranchisement pro-

duced exactly the same result, as if so much money had been bequeathed away from the heirs. The Mahomedan lawyers, therefore, in calculating whether more than one-third of the property had been disposed of, always included in their calculation of the one-third the value of the slaves who had been enfranchised, either by a sick man or by will.

The analogy between this restriction of the Mahomedan law and that of the *Lex Furia Caninia* of the Roman law is obvious.

Another kind of disposition of property which is brought under restriction by the Mahomedan law is that which Mahomedan lawyers call *mohabat*. Besides giving away his property, a man may exercise his bounty in other ways. The transaction may wear the appearance of a bargain, and yet in reality the intention may be that one party should gain at the expense of the other : and if gifts alone were prohibited, people would be very likely to dispose of their property under cover of such bargains. Thus suppose *A*, who is dying, wants to make a present of a valuable property, say a house, to *B*. *A* is afraid that if he gives the house to *B*, the gift will be invalid as exceeding the one-third which he is allowed to dispose of. He therefore goes through the form of selling the property to *B* for a trifling sum. Now wherever a transaction is found to be of this character—wherever the intention is not to make a bargain but to confer a benefit on the nominal purchaser—whenever, as the Roman lawyers say, there is *liberalitas* and *lucrativa causa*, it will be regarded by the Mohammedan lawyers as *mohabat* : and come under the restriction. The restriction is that, if the transaction takes place during ‘sickness’, that is, during the last illness, the loss to the estate which is caused by the transaction must be reckoned when the computation is



made of the disposable one-third. Thus if *A* on his death-bed has sold to *B* a house worth R5,000 for R500, the transaction would be regarded as *mohabat*, and reckoned as a disposition of property to the extent of R4,500. If, then, *A* has given a legacy of R1,000, and another legacy of R500, and the whole value of the property was only R15,000, the one-third would be exceeded, and there would have to be a reduction. But the *mohabat* transaction takes precedence of legacies. In the case put, therefore, *B* would keep the house, and the reduction would fall entirely upon the two legacies.

There is still another mode in which property may be disposed of in favour of persons whom the owner desires to benefit; namely, by acknowledging a debt in favour of a person to whom nothing is really due. Such an expedient is mentioned by Mahommedan writers on law as being sometimes resorted to: and it would have been consistent with principle to put such acknowledgements, if made during sickness, under restriction. This, however, has not been done; perhaps through fear of the extreme discredit which attaches to the memory of a deceased Mahommedan, if his debts are not fully paid; a fear which almost amounts to a superstition. The amount of debts, therefore, which may be acknowledged on a death-bed is unlimited. But no acknowledgement of a fictitious debt can be made in favour of an heir, so that the rule which prohibits a bequest of property in favour of an heir cannot be infringed by this indirect method. So, too, what Mahommedans call debts of health are paid before debts of sickness. And a debt acknowledged upon a death-bed cannot be made chargeable upon any specific portion of the property.

#### INTESTATE SUCCESSION

I have now laid down the principal rules of the Mahommedan law relating to testamentary succession,

but unless the whole estate is swallowed up by the debts and funeral expenses, there will always remain two-thirds to be distributed amongst the heirs. The rules of intestate succession, therefore, play a very important part in Mahommedan law, and they are of a very elaborate kind: they are not, however, difficult of application.

I will first state what are the provisions which we find in the Koran itself upon this important subject. The two important passages will be found in the Chapter of Women.<sup>1</sup> All that we find there is a general statement that when a man or woman dies, his or her kindred (as the case may be) should take some share of the property of the deceased: and it is further stated who of the kindred is entitled to a share, and what share.

The persons enumerated in the Koran as entitled to a share are the father, the true grandfathers,<sup>2</sup> the half-brothers by the mother, whom we may call the uterine half-brothers, the daughters, the daughters of a son how low soever,<sup>3</sup> the mother, the true grandmothers, the full sister, the half-sister by the father, whom we may call the consanguine half-sister, and the half-sister by the

<sup>1</sup> Chap. iv of Palmer's Translation in *Sacred Books of the East*, vol. vi, pp. 72, 73 and 96; Sale's *Koran*, Sura iv. 8, 16.

<sup>2</sup> The ascendants of any person are classified by Mahommedan lawyers in the following manner:—

1. The 'true grandfathers'; these are the father's father, father's father's father, &c., in the direct male line.

2. The 'false grandfathers'; these are the male ascendants except the father in any degree, between whom and the deceased a female enters; in other words, all the male ascendants, except those in the direct male line.

3. The 'true grandmothers'; these are the female ascendants in any degree, between whom and the deceased no false grandfather intervenes. A true grandmother, therefore, may trace her connexion with the *propositus* entirely through females or entirely through males, or through both.

<sup>3</sup> The expression 'how low soever' is an abbreviated one. It signifies 'however many generations distant from the *propositus*'.

mother, the uterine half-sister. Besides these ten classes of persons, who are all blood relations, the husband has a specific share assigned to him in the property of his deceased wife, and the wife a share in that of her husband. There are, therefore, altogether twelve classes of sharers.<sup>1</sup>

The shares which are allotted to these persons by the Koran are not invariable. They vary according to the state of the family.

There are, however, two obvious reasons why this statement of the law of inheritance is incomplete. In the first place, the son is not mentioned as entitled to anything, and it is certain that it was not intended that he should be altogether excluded; and secondly, in most cases the shares taken by the persons here mentioned would not exhaust the property.

There has never been any doubt as to how this omission is to be supplied. It is by the already then existing Arabian system, which it was not the intention of the Prophet to displace, but only to supplement and modify. That system was severely agnatic, giving the whole inheritance to the male agnates,<sup>2</sup> excluding all women, and all cognates male or female. The effect of the precepts contained in the Koran is not to displace this system altogether, but to allow certain shares to be deducted before the property is divided amongst the agnates, and to limit the application of the strict rule of agnatic succession to the remainder.

<sup>1</sup> The word 'sharers' is used in a special technical sense by writers on Mahommedan law. There are, as will appear presently, other persons who take portions of the inheritance, and are, therefore, in a general sense of the word 'sharers'. But I shall use the word in its special, and restricted, sense, namely, that of persons specified as entitled to a share by the Koran.

<sup>2</sup> The Arabic word for male agnates is 'asabah'. This word is always translated 'residuaries', because they take the residue after the sharers are satisfied.

It is, of course, conceivable that a man might die leaving behind him no persons whom the Koran designates as sharers. In that case the whole property will be taken by the male agnates.

Or again, it is conceivable, though less likely, that a man might die leaving no one entitled either as a sharer or as a male agnate. This case is not provided for by the Koran, nor is there the least reason to suppose that it was provided for by any ancient Arabian custom. Indeed at one time it was suggested that the property would in such a case be forfeited to the State, as with us when there are no heirs. But if we examine a pedigree, we shall see at once that this excludes some very near relatives. It excludes, in fact, all persons who are related to the deceased through females—all cognates as they are called—except those who happen to be sharers. Thus a daughter's children would be excluded; so also would a sister's children; and many others. It is now, however, a well-established rule of Mahommedan law that, in the absence of sharers and residuaries, persons who are neither the one nor the other, but who are cognates to the deceased, will succeed to the property. They are called in Arabic *Zavi-ul-arham*, which means, literally, 'uterine kindred,' and this fairly describes the class intended. They are all uterine kindred or kindred through females, but all uterine kindred do not belong to this class, some are sharers. English writers, following Sir William Jones, have called them 'distant kindred', which is not only an inaccurate translation of the Arabic, but is misleading. The *Zavi-ul-arham* are not necessarily distant at all, as is shown by the examples I have given. Nor has distance anything to do with the matter; for the male agnates are never included in the *Zavi-ul-arham*, however distant they may be. It is best to call this class

of heirs 'cognates who are neither sharers nor residuaries', or, if brevity is desired, 'cognates.'

In this way we get three classes of heirs under Mahommedan law, but this classification did not give complete satisfaction. The Mahommedan lawyers, however, did not venture upon any direct alteration of the law. They resorted, as usual, to an indirect method, and they arrived at the desired result by a very curious artifice. Mahommedan lawyers still assert that the heirs of a man are the three classes I have mentioned above, i. e. the sharers, the male agnates, whom we call residuaries, and the cognates (*Zavi-ul-arham*): nor did they venture to interfere with the sharers, whose position is defined in the Koran. But they have managed to introduce into the second class persons who are not male agnates at all. The persons so introduced are the daughter, the son's daughter, the full sister, and the consanguine sister. These are agnates but not male agnates. It is admitted that they have no right as residuaries of their own, but under certain circumstances which I shall explain hereafter, they are admitted under the curious description of 'residuaries in right of another'.

Besides the residuaries in right of another, mention is also made of 'residuaries with another'. These are, however, only two out of the four persons just mentioned, namely, the full sister and the consanguine sister, taking under circumstances slightly different, which I shall also explain.

Thus we get as the Mahommedan heirs:—

1. The sharers.
2. The residuaries, who are of three kinds, viz. :—
  - (a) The residuaries in their own right.
  - (b) The residuaries in right of another.
  - (c) The residuaries with another.

3. The cognates, or, as they are generally but wrongly called, the distant kindred.

I shall now state some general rules of inheritance, most of which are applicable to all the classes of heirs.

First, there is no primogeniture in the Mahommedan law of inheritance: all the sons take equally.

Secondly, there is a preference of the male sex, a male as a rule taking twice as much as two females, if he does not exclude her altogether.

Thirdly, the females can only take as sharers two-thirds of the property between them.

The second and third rules are laid down in the Koran. But the rule which limits the females to two-thirds is considered to have no reference to the mother or the wife, whose shares are not reckoned in the application of this rule.

Fourthly, there is no right of representation in the Mahommedan (Sunni) law of inheritance.

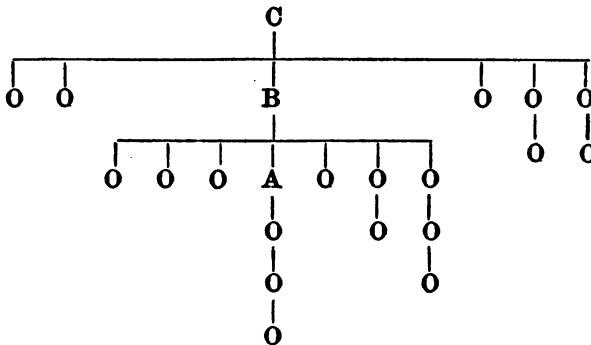
Fifthly, whoever is related to the deceased through any person cannot inherit anything whilst that person is living. Thus a grandchild cannot inherit anything from its grandfather in the lifetime of its parents; so a paternal uncle's son cannot inherit anything in the lifetime of the father of the deceased. To this rule, however, there is the important exception that the brothers and sisters are not excluded by the mother—another instance of the mother being kept apart, as it were, in the rules of inheritance.

Sixthly, if there are several persons all standing in the same relation to the deceased, e.g. several sons or several daughters, or several sons of a deceased brother, then they all take equally, *per capita*, as it is called, and not *per stirpes*. Thus if the two sons of one deceased brother, and the three sons of another, were

residuaries, they would each take one-fifth of the residue.

There are a few cases in which the share allotted to several is larger than the share allotted to a single person, but the above rule that all who are of the same degree take, as between themselves, equally, is invariable.

Besides these rules there are the rules for finding which of the residuaries (male agnates) are entitled to succeed. These rules are analogous to, though not identical with, those which prevail under the Hindu law.<sup>1</sup> Suppose the following chart to represent the male agnates of a family whose common ancestor is C.



And suppose A to be the deceased person the inheritance to whose property is in question. It is obvious that this family can be divided into groups, each of which is also descended from a common ancestor. There is first the group consisting of A and his immediate descendants, which we call the group A, and being the nearest to A we will call this the 'first class' of agnates. But A is the son of B; and B's descendants form a group, all of whom are also agnates of A. This group includes those whom, as descended from A, we

<sup>1</sup> See the observations on this aspect of the family, *supra*, p. 54.

have already called the first class of agnates in relation to A ; the rest who are descended from B but not from A we will call the second class of agnates in the same relation. B is the son of C, and C's descendants form a group all of whom are agnates of A. This group includes both the first and the second class of A's agnates, but also others who are descended from C but not from A or B. These we will call the third class of A's agnates.

This would be the strict classification of the agnates in accordance with their proximity to A : it can obviously be carried through as many generations as we please ; and it is this classification which is adopted by the Mahommedan law of inheritance in regard to residuaries, with one variation. Thus, A being the deceased person to whom descent is to be traced, the first class of residuaries, that is, the class from which, if it exists, the heir is to be taken to the exclusion of all the others, is that which consists of the direct descendants of the deceased ; this class Mahommedan lawyers call the 'offspring'.

The next class of residuaries varies somewhat from the classification given above. It consists of the direct line of lineal male ancestors only, B, C, &c. These under the Mahommedan law form a separate class, and are called the 'root'. This is the only variation. The third class of residuaries consists of the descendants of B other than the descendants of A (the second class in our chart) ; the fourth class of residuaries consists of the descendants of C, other than the descendants of A and B, and so on.

But this is only a classification of the residuaries ; we have still to ascertain who actually succeeds to the property.

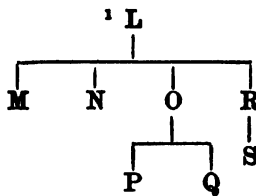
The rules for ascertaining this are as follows :—First



we take the nearest class of residuaries, the 'offspring' if there is any, and of these we take the nearest to the deceased, first the sons, then the grandsons, and so on. In the other classes we take those who are nearest to the common ancestor of that class. Thus suppose M<sup>1</sup>, the son of L who is dead, were to die leaving a brother N, two sons of a deceased brother O, namely P and Q, and S, the son of another deceased brother R, then N, P, Q, and S are the third class of residuaries, and, there being none of the first or second class, they are the nearest to M. The one who succeeds, and the only one, is N as nearest to the common ancestor L, and therefore nearest to M. But if N were also dead, P, Q, and S being all equidistant would take each one-third.

These are the general rules of inheritance, but there are some rules applicable to special cases. These I shall state in the course of the examination which I now proceed to make of the position of each member of the family.

The first person whose position I shall consider is the *son*. He is never a sharer, but he is a residuary, and his position is a very strong one. He is first in the first class of residuaries. He excludes, therefore, all the other male agnates. Further, by a special rule, when there is a son, he excludes the sister and the daughter from a share. Lastly, when there is a son, the shares of the husband, the widow, and the mother are considerably reduced. The son can never fail, therefore, to secure a considerable portion of the inheritance; though, of



course, the amount of the surplus depends upon the state of the family.

The position of any other descendants in the direct male line (*sons how low soever*) is very similar to that of the son. These descendants all belong to the first class of male agnates, and as such are residuaries, but they will be excluded by any one who intervenes between them and the deceased, and they do not reduce the shares of the sharers to the same extent as a son.

I now go to the *father*. He is a sharer, and, as such, takes a fixed share of  $\frac{1}{6}$ . He is also a residuary; he belongs to the 'root', or second class of male agnates, and ranks, therefore, next after the offspring of the deceased.

The *father's father* also takes a fixed share of one-sixth as sharer. But he cannot take a share if the father is alive, and thus stands between him and the deceased. He belongs to the root or second class of male agnates, and will take as residuary, if neither the father nor the offspring of the deceased stand in his way.

The position of any *true grandfather*, i.e. of any ascendant in the direct male line, is precisely analogous to that of the father and grandfather.

An only *daughter* takes as sharer  $\frac{1}{2}$  of the property; two or more daughters take  $\frac{2}{3}$  between them. But, as I have said, a son excludes a daughter from a share. It was to prevent the daughter being thus excluded altogether that the Mahommedan lawyers invented the contrivance of making her 'a residuary in right of her brother'. If the daughter loses her share in this way, she comes in again as (so-called) residuary, but, as a female, only takes  $\frac{1}{2}$  of what her brother takes.

No descendant of a daughter takes either as sharer or residuary; but such a descendant may come in as a cognate (distant kindred).

The *mother* gets  $\frac{1}{3}$  when there is a child of the deceased, or a child of any son how low soever; also when there are two or more brothers or sisters. But if there are none of these persons, then the mother's share is increased to  $\frac{1}{3}$ . There is, however, this peculiarity in computing the share of the mother. If the wife, or the husband, and the father are alive, as well as the mother, then the share of the mother is not one-third of the whole property, but one-third of the remainder after deducting the share of the husband or wife. The mother is never a residuary; and, on the other hand, is never excluded entirely from a share.

The *brother* is never a sharer; only a residuary. He is in the third class of male agnates, the offspring of the father of the deceased. He would, therefore, come after the offspring of the deceased, and also after the root.

The *daughters of a son how low soever* are in a position in some respects similar to that of daughters of the deceased; they get a share of  $\frac{2}{3}$  between them if there are several, whilst a single one gets  $\frac{1}{2}$ . But the daughter of a son is more liable to be excluded than a daughter of the deceased. She is excluded from a share by any male agnate of the first class, who is above or level with her. If, however, the person who excludes her is her own brother or level with her,<sup>1</sup> then she comes in again as residuary in right of that person, taking half of what he takes. The daughter of a son how low soever may also be excluded by reason of daughters nearer to the deceased having exhausted the  $\frac{2}{3}$  allotted to females, in which case she can come in again as residuary in right of a male descendant of a lower degree who is himself a residuary. Of course, if the deceased leaves only one daughter who

<sup>1</sup> By 'level with her' is meant at the same distance from the common ancestor. By 'above' is meant nearer to the common ancestor.

takes  $\frac{1}{2}$ , there will still remain  $\frac{1}{6}$  out of the  $\frac{2}{3}$  for the son's daughter.

The *sisters* are in some respects in a position similar to that of the daughters. A single sister takes  $\frac{1}{2}$ , whilst several sisters take  $\frac{2}{3}$ . But a sister is excluded from a share by any male agnate of the first or second class, and in that case gets nothing. A brother also excludes her from a share, but in that case she comes in again as residuary in right of her brother, taking  $\frac{1}{2}$  as much as he takes. But besides this, even if there be no male agnate of the first or second class, and no brother, still she may be excluded because the  $\frac{2}{3}$  allotted to females may be exhausted by the daughters or daughters of sons. Again, therefore, the sister would be excluded from a share, and the whole residue would go to the nearest male agnate. Bearing in mind the state of the family which we are considering, this would be an uncle or nephew of the deceased, or some remoter male relative, who would sweep off all that was left after the daughters' or son's daughters' shares as well as that of the mother and the wife or husband (if any) are satisfied. This was considered inequitable, and in order to remedy it the Prophet is said to have resorted to the contrivance of making sisters in such a case succeed as residuaries; not, of course, *in right of*, but *with* the daughters or son's daughters. It is not likely that the Prophet, with powers of legislation wholly unfettered, would have resorted to so clumsy a contrivance; and no such precept is to be found in the Koran. It is, however, clothed by tradition with the sanction of his absolute authority; and, at the same time, it is put in a form which gives it the semblance of adhering to principle. In truth, it simply substitutes the sister as residuary for the nearest male agnate, who is excluded altogether.

The share of the *husband* in the property of the

deceased wife depends upon whether there are any children or not. If there are children he gets  $\frac{1}{4}$ ; if there are none he gets  $\frac{1}{2}$ . The husband is always a sharer, and never a residuary.

The share of the *widow* in the property of her deceased husband is exactly half of that which the husband who survives her takes of her property under similar circumstances. If there are children she takes  $\frac{1}{8}$ ; if there are none she takes  $\frac{1}{4}$ . The wife, too, like the husband, is always a sharer, and never a residuary.

The *true grandmother* takes a fixed share of  $\frac{1}{8}$ . Of the numerous true grandmothers, of course, only the nearest takes; and any true grandmother is liable to be excluded by the 'mean of consanguinity', as it is called, that is, because she traces her consanguinity with the deceased through a living person.

The *uterine brother*, i.e. the son of the same mother by a different father, is never a residuary, but he takes a share of  $\frac{1}{8}$  if one only;  $\frac{1}{3}$  between them if there are several; but uterine brothers are excluded by any direct descendant, or by any direct male ascendant.

The *uterine sister* is in the same position as the uterine brother.

The *consanguine brother* is, of course, a male agnate, but his title as a residuary is postponed to that of a full brother.

The *consanguine sister* when she takes with a full sister takes only  $\frac{1}{8}$  out of the  $\frac{2}{3}$  allotted to sisters, and the sister takes the remaining  $\frac{1}{2}$ .

These examples will show you some of the special rules, and also how the general rules are worked. I will now proceed to deal with a peculiar case. The sharers may be so numerous that they not only swallow up all the property but it may be impossible to satisfy them all. Thus, suppose the deceased to have left a husband, a father, a mother, and a daughter. The share of the

husband is  $\frac{1}{4}$ ; the share of the father is  $\frac{1}{8}$ ; that of the mother is  $\frac{1}{8}$ ; and that of the daughter is  $\frac{1}{2}$ . Adding them together by reducing the fractions to a common denominator, we get  $\frac{3}{12} + \frac{2}{12} + \frac{2}{12} + \frac{6}{12}$  or  $\frac{13}{12}$ . It is impossible, therefore, to give all these persons their full shares. This difficulty always arises when the sum of the fractions is greater than unity. The shares must, therefore, be reduced, and the problem is, so to reduce the shares as to make the sum of them equal to unity, and yet so as not to disturb the proportion between them. The rule for doing this is very simple. The shares are reduced by increasing the number of parts into which the property is divided, that is by *increasing* the denominator to the sum of the numerators. Thus  $3 + 2 + 2 + 6 = 13$ ; and, therefore, instead of dividing the whole property into twelfths, we divide it into thirteenths, the shares will then be  $\frac{3}{13}$ ,  $\frac{2}{13}$ ,  $\frac{2}{13}$ , and  $\frac{6}{13}$ . These added together make  $\frac{13}{13}$ , or exactly unity as required: whilst the relative proportion of the shares is preserved.

From the circumstance that the common denominator of the fractions is increased, this process is called the *increase*: though the result is that the shares themselves are *decreased*.

I will now take the converse case. The residuaries, as you know, take the surplus between them, after the sharers are satisfied. But it might happen that there was a surplus, and yet no residuaries to take it. Thus, suppose a woman dies leaving a husband and three daughters. The husband takes  $\frac{1}{4}$ ; the daughters  $\frac{2}{3}$ . Adding these together we get  $\frac{3}{12} + \frac{8}{12} = \frac{11}{12}$ . There is, therefore,  $\frac{1}{12}$  left. Who then is to take the  $\frac{1}{12}$ , there being no residuary? It might seem at first sight that it would be taken by the *Zavi-ul-arham*, or cognates, the persons who are erroneously called distant kindred. But it is not so. The cognates only take when there are

no sharers, and no residuaries. The case is a rare one, and it has been suggested that the proper course is to hand over the surplus to the Public Treasury. But it is now universally agreed that the Treasury has no claim, and that the surplus should be divided amongst the sharers in proportion to their shares. This is like the *ius accrescendi* of the Roman law. The Mahomedan lawyers call it the *return*.

There are, however, two persons who are excluded from the benefit of the return—the husband and the wife. If, therefore, there is a husband or a wife, and a return is to be made, his or her share must be deducted before the return takes place. Thus in the case put, before making a return of the  $\frac{1}{12}$  to the sharers we must deduct the share of the husband, and then distribute the  $\frac{1}{12}$  amongst the daughters, who will of course take equally. For example, if there are three daughters, each will take as her primary share  $\frac{1}{3}$  of  $\frac{2}{3}$  or  $\frac{2}{9}$ ; and by the return  $\frac{1}{3}$  of  $\frac{1}{12}$  or  $\frac{1}{36}$ ; on the whole, therefore, each daughter takes  $\frac{2}{9} + \frac{1}{36} = \frac{9}{36}$ . This gives for the three daughters  $\frac{27}{36}$ , and adding the  $\frac{9}{36}$  taken by the husband we get  $\frac{36}{36}$ , or exactly unity as required.

I will take another example in which there is a return, and which is not quite so simple. A man dies leaving a wife, three daughters, and a true grandmother. The wife takes  $\frac{1}{8}$ , the grandmother  $\frac{1}{6}$ , and the daughters  $\frac{2}{3}$  between them. Adding them together we get  $\frac{3}{24} + \frac{4}{24} + \frac{16}{24} = \frac{23}{24}$ . There is, therefore,  $\frac{1}{24}$  left as surplus, and there being no residuaries there is a return. This is to be divided between the grandmother and daughters (the wife being excluded) in the proportion of one to four. The grandmother, therefore, will take  $\frac{1}{5}$  of this surplus, and the daughters  $\frac{4}{5}$  between them. On the whole, therefore, the grandmother takes  $\frac{1}{6} + \frac{1}{5}$  of  $\frac{1}{24} = \frac{1}{6} + \frac{1}{120} = \frac{21}{120}$ ; and the daughters take  $\frac{2}{3} + \frac{4}{5}$  of  $\frac{1}{24} = \frac{2}{3} + \frac{4}{120} = \frac{84}{120}$

between them. Adding these to the wife's share of  $\frac{1}{8}$ , or  $\frac{15}{120}$ , we get  $\frac{21+84+15}{120} = \frac{120}{120}$ , as required. The share of each daughter will be got by taking  $\frac{1}{3}$  of  $\frac{84}{120}$ , giving  $\frac{28}{120}$  each.

A posthumous child has the same rights of inheritance as a child born in the lifetime of its father.

The rights of inheritance are very often thrown into confusion by two members of the family dying under circumstances which make it impossible to say which died first, as when both are killed in the same battle, or both are lost in the same ship. The only way of settling the rights of the parties in such a case is by making a rule of law to govern the case. Under the Mahommedan law, if there is no evidence to the contrary, it is presumed that the two deaths are simultaneous. Thus, if *A* and *B*, two brothers, were both lost in the same ship, the property of *A* would go to the heirs of *A*, exclusive of *B*, and the property of *B* would go to the heirs of *B*, exclusive of *A*.

There are, or were, three impediments, as they are called, to inheritance: (1) that the claimant is a slave, (2) that he is not of the Mahommedan faith, (3) that he himself caused the death of the deceased. The impediment arising from slavery is, of course, obsolete. The impediment which arises from a difference of religion has been much modified in India by Act XXI of 1850, which declares that no rights of inheritance shall be forfeited by a change of religion. But Mahommedans maintain that this only affects persons who have been Mahommedans and have been converted, and that it does not affect the descendants of such persons. The language of the Act is not quite clear.

The slayer is excluded by the Mahommedan law from succeeding to the property of the person whose death he caused, whether the homicide was culpable or not.



So say a great number of Mahommedan lawyers, but they accompany this statement with qualifications which seem to show a desire to escape from the necessity of punishing a perfectly innocent man.<sup>1</sup>

If no person can make out a claim to be heir to the deceased, either as sharer, residuary, or distant kindred, the property will belong to the Government.

#### ON THE CREATION OF FICTITIOUS RELATIONSHIPS

Until slavery was abolished in India in the year 1843, there was, by a fiction, supposed to be a relationship between the master and the emancipated slave, which not unfrequently affected the inheritance from the slave. The creation of fictitious relationships is not unknown elsewhere, but we generally encounter it in the form of the adoption of a son, as is common amongst Hindus where the object is simply to procure an heir, and this has led Sir Henry Maine to speak of it as filling the place of a will.<sup>2</sup> But the Mahommedan idea is different altogether. A liberated slave is, in the eye of the law, a kinless person; he has no family to be generally responsible for his acts; and it was a widely extended notion in early societies that this could not be. This difficulty was obviated in ancient Rome by making the liberated slave the client of his late master (*patronus*). The Mahommedan law treated him as a blood relation;<sup>3</sup> the family of the master incurred the same responsibility as for members of their own family; and if (as was very

<sup>1</sup> See Ameer Ali, *Mahommedan Law*, vol. ii, p. 87.

<sup>2</sup> Maine's *Ancient Law*, ed. of 1897, p. 193.

<sup>3</sup> Although the law is obsolete, this subject has still some historical interest. The explanation of it contained in one of the preserved sayings of the Prophet himself is as follows:—'Between him who enfranchises and him who is enfranchised there is a bond similar in its nature to that of consanguinity. By enfranchisement the slave is extricated from his previous condition, which is one of [in a legal sense] non-existence; and he is brought into existence by the enfranchisement, just as a child is brought into existence by the father.'

often the case) the enfranchised slave left no wife or children who could succeed him, the master's family could come in as 'residuaries for special cause'.

There is another class of persons who are not unlikely to be kinless according to Mahommedan ideas, namely converts to Islam, and to meet this case the Mahommedan law allows the convert to attach himself to a Mahommedan family if he can find a family which will consent to receive him, and the same rights of inheritance would accrue to the family of the person who received him, as in the case of the enfranchised slave.<sup>1</sup> There are not now many converts to Islam in India, and it is not likely that any there might be would think it worth while to make such an arrangement. Nor do I think it likely that the courts would recognize any such arrangement, as the whole principle on which it rests, namely, the joint responsibility of the family for the individual acts of its members, is wholly obsolete.

One more way of creating fictitious relationships is by what is called acknowledgement. Any person who is not known to have any relations of his own may be acknowledged by another person as his relation, and if the person making the acknowledgement have no sharer or distant kindred or other residuary to succeed him, the person acknowledged will be treated as a residuary.

It is important to distinguish carefully between this kind of acknowledgement and the acknowledgement, not of a fictitious but of a real relationship. This not unfrequently takes place in the case of a son or daughter; and by the Mahommedan law this acknowledgement is conclusive as to the relationship of parent and child,

<sup>1</sup> The form of the transaction was as follows. The person who desired to attach himself to the family of the person willing to receive him said to the latter, 'Thou art my kinsman, and shalt be my successor after my death, paying for me any fine or ransom to which I may be liable.'

unless it can be shown to be absolutely impossible that the relationship could exist, as, for example, that the supposed parent and child were of nearly the same age. The acknowledged child may also refuse to be a party to the transaction.

## CHAPTER III

### MARRIAGE

THE Mahommedan marriage is a transaction based upon the consent of the parties or of persons by whose consent they are bound. No formality is required, nor any religious ceremony.

Whether or no a valid contract of marriage has taken place must of course be decided, if it is contested, by the usual rules of evidence. But there are circumstances which in a valid marriage are so universal that they almost amount to formal requirements. It is the universal practice to summon persons for the special purpose of witnessing the transaction : two male persons or one male and two females being considered necessary. In declaring the intention of the parties, care is generally taken to use the word *nikka*, which signifies marriage, and makes the intention clear. But the use of this word is not imperative : any words which indicate clearly the intention of the parties are sufficient.

The usual conditions necessary to constitute a valid contract are necessary to constitute a contract of marriage also. The parties must be of sound mind, and otherwise competent to contract.

The contract of marriage, like other contracts, may be made through an agent.

A child may be betrothed by its father or, in his absence, by its grandfather, and in this case the transaction is at once complete.

In the absence of the father and grandfather, the child may be betrothed by the brothers, and certain other members of the family. But in this case the child has what is called 'the option of puberty'. This option must be

exercised by a girl as soon as she arrives at puberty ; by a boy at any time after puberty and before consummation.

Mahommedans, even in the lower ranks of life, generally have some formal written document drawn up, in which all the terms and conditions of the agreement between the parties are fully stated. In this document stipulations are frequently made by a woman before surrendering herself to the power of her husband, not only as to the dower she is to receive, but as to where she is to live, what liberty she is to have, and so forth.

The Mahommedans have a table of prohibited degrees not very different from our own, and within these degrees no marriage is possible.

There are also some special rules of prohibition arising out of the practice of polygamy. Thus a man may marry two sisters successively, but may not be married to two sisters at the same time. So a man cannot be married at the same time to an aunt and a niece ; and generally it may be said that a man cannot be married to two persons very nearly related by blood to each other.

Mahommedans consider that if a woman takes a child to nurse she contracts a sort of maternity towards it : and if a boy and a girl are suckled by the same woman they are supposed to become in a sort of way brother and sister. This kind of relationship does not affect rights of inheritance, but it affects the capacity of the parties to marry. It is said in a general way that whatever is prohibited by marriage is prohibited by fosterage. However this may be socially, it is not so legally. But the marriage of persons very closely related by fosterage would perhaps be held invalid.

It is not very easy to state the rules of Mahommedan law with certainty as to the invalidity of marriages on other grounds than that of consanguinity. It must be borne in mind that the Mahommedan law makes a dis-

inction between marriages which are void altogether from the first, and those which are not void *ab initio*, but may be dissolved by a court or by the consent of the parties.

The marriage of a Mahommedan man with a widow or with the divorced wife of another during her *iddut*, as it is called, is void *ab initio*. The *iddut* is a period of chastity which a Mahommedan woman is bound to observe after the dissolution of a marriage by the death of her husband or by a divorce. It generally lasts for about three months.

So also the marriage of a man with his own divorced wife is void *ab initio*, but this marriage may be made effectual by a contrivance which I will notice presently.<sup>1</sup>

The marriage of a Mahommedan man with a Jewess or a Christian<sup>2</sup> is lawful; the marriage of a Mahommedan man with the woman of any other religion is prohibited, but it is not invalid *ab initio*. It can only be got rid of by a decree of the court or by consent of the parties, and the previous issue of the marriage will still be legitimate.

The marriage of a Mahommedan woman with an 'infidel', i.e. with a person who is not a Mahommedan, is generally said to be unlawful, and no distinction is made between Jews and Christians and other 'infidels', but such a marriage would not be void *ab initio*.

The marriage of a Mahommedan woman with a second husband whilst her first husband is alive, and is still her husband, is, of course, absolutely void. With regard to the husband, it is clear that he is allowed to have four legal wives, and in British India not more than this. But the marriage of a fifth wife would not, I think, be void *ab initio*, but only voidable.<sup>3</sup>

<sup>1</sup> *Infra*, p. 142.

<sup>2</sup> Jews and Christians are called 'Kitabias', people of the Book (Kitabi).

<sup>3</sup> I gather that Sir R. Wilson thinks otherwise. See his *Digest*, p. 139.

## CHAPTER IV

### DIVORCE

THE discussions which we find in the Mahommedan law-books upon the question when a divorce is permissible do not seem to me, from a legal point of view, to lead to any very important result. Socially speaking, no doubt, they are of considerable importance, as they show what, in the estimation of persons whose opinion is entitled to the greatest weight, is a just and honourable course to be pursued in case a marriage turns out unhappily. But the law leaves the wife without any legal protection against the absolute power of divorce which, according to Mahommedan law, is possessed by the husband. Even if the husband should bind himself by a formal promise not to exercise the power of divorce, he will not be prevented from exercising it, and a divorce pronounced by him in violation of such a promise will be effectual. So if by a mere slip of the tongue he divorces the wrong wife, the divorce of the wife named by mistake is valid. So any words amounting to words of repudiation are sufficient: and contrary to the usual rule, the words used, rather than the intention, are looked to. The converse, however, holds good; and an intention to divorce not given effect to by a declaration in words is not effectual.

A divorce remains revocable until one of two events has happened, namely, until the woman has passed through her *iddut*, or until the divorce has been three times pronounced: when either of these two events has happened the divorce becomes irrevocable. If these pro-

visions had been fairly administered there would have always been an opportunity of recalling a hasty divorce, or one made under a misconception. But their whole value has been destroyed by the Mahommedan lawyers, who, most unreasonably, attribute the same consequences to a mere repetition three times over in rapid succession of the words of repudiation, as to three really distinct acts. Thus if a man speaking, as men speak in a rage, as rapidly as possible, say to his wife, 'Thou art repudiated, repudiated, repudiated,' the divorce is declared to be irrevocable. The consequences are all the more serious, because the divorced parties are forbidden to remarry. Modern lawyers, however, say that the prohibition of a remarriage ceases to apply after the woman has again married and been again divorced. A divorced woman will, therefore, sometimes go through the form of a marriage with a man who at once divorces her, and thus enables her to remarry her former husband.

A Mahommedan may not only divorce his wife, but may place the power of doing so in the hands of another person; even in those of the wife herself. Use is sometimes made of this to protect the wife from ill-treatment. The husband may sometimes in a better mood agree, or he may be bribed to agree, to give his wife power to divorce herself, or to give that power to some third party, in case of his again ill-treating her.

The Mahommedan lawyers speak of divorces by mutual arrangement. An arrangement for divorce made at the instance of the wife is called *khula*; that made at the instance of any other person is called *mubarat*. The terms of such an arrangement can, however, always be dictated by the husband, and, therefore, when we find it stated that under certain specified circumstances the parties are entitled to a divorce on certain specified terms, all that can be meant is that, from a social point



of view, such an arrangement would be proper. And it seems to be considered that, if it is hopeless that any happiness can result from a marriage, it would be discreditable to the husband to refuse to listen to a proposal for a divorce. So also it would be deemed improper for a husband granting a divorce to be too exacting in his terms. The fairest course is considered to be to leave them to be settled by the Kazi, or by mutual friends. A divorce out of mere caprice, or founded upon an unjust accusation of misconduct, would certainly also be considered discreditable to the husband. A wife seeking a divorce would be expected to remit her claim to dower, or to refund it if already paid.

The Mahommedan law has, very properly, put a check upon death-bed divorces. Almost the only object of such a divorce would be to disinherit the wife. That, at any rate, would be its legal result. If therefore a husband, being already sick, divorces his wife, even by a triple repudiation, and then die before the expiration of her *iddut*, she is still entitled to her share in the inheritance. But if he do not die until after her *iddut* is completed, she has no claim.

There is under the Mahommedan law a peculiar proceeding, leading to a dissolution of marriage, and which goes by the name of *laan*, or imprecation. It can be resorted to when the husband brings a charge of adultery against the wife. It takes place before the Kazi, and it can be instituted either by the husband or the wife. The object of the wife may be either to clear her character, or to procure a dissolution of the marriage. But as the husband can always dissolve the marriage when he pleases, his object will be, not a divorce, but to bastardize any child of which his wife may be pregnant. The proceeding is as follows. The moving party summons the other to appear before the Kazi, and each is

then required to take an oath accompanied by the most awful imprecations; the husband swearing that the charge is true, and the wife that it is false. The husband also swears that any child of which his wife may be pregnant is not his. If the husband takes the oath then, whether the wife takes it or no, the marriage is dissolved; and if the husband has also by his oath denied the paternity of the child, the child is declared illegitimate. If the husband refuses to take the oath the proceeding drops; the woman's character being then considered as cleared, and the husband is then liable to be punished for defamation. But he can still divorce his wife if he likes. The whole proceeding is probably now obsolete.

## CHAPTER V

### DOWER

THE subject of dower is a very important one in the Mahommedan law. The dower of the Mahommedan law is not, like the *dos* of the Roman law, or the *dot* of the French law, a contribution by the wife to the expenses of the joint household, nor is it, like the dower of English law, a provision made for the wife out of the husband's estate after his death, but it is a gift made or promised by the husband to the wife on the occasion of the marriage. It may, therefore, be compared to the *donatio propter nuptias* of the Roman law, or to the *Morgengabe* of Teutonic nations.

It is sometimes stated that dower is essential to a Mahommedan marriage. This is not correct, because this would imply that a marriage without dower is invalid, which is certainly not the case. It is very rare indeed that a Mahommedan woman is married without being provided by her husband with a dower, but she may, if she chooses, forgo her claim to dower. If, however, nothing whatever is said about dower at the time of the marriage, it is possible that she might claim to have a reasonable amount of dower settled for her.

Dower is either prompt or deferred. Prompt dower is dower which becomes due as soon as the marriage is consummated. Deferred dower is dower which becomes due when the marriage tie is dissolved by death, or otherwise.

If a marriage is contracted, but not consummated, half the dower is payable.

The dower is the wife's own property, like any other money that is paid or owing to her. If not paid at her husband's death she is a creditor on his estate, but she has no claim to a preference over other creditors. She may, however, have a sort of lien, because, it seems, that if she is in possession of her husband's property, she cannot be compelled to give it up until her dower is paid. It has been also considered that a person purchasing any portion of the estate of a deceased person ought, if he receives notice that her dower is unpaid, to see that her claim is satisfied.

## CHAPTER VI

### LEGAL POSITION OF MAHOMMEDAN WOMEN

A GOOD deal has been said about the position of a Mahommedan woman, and Mahommedans are naturally very anxious to make out that it is not as bad as we suppose. There are, no doubt, social customs which protect her, but still it can hardly be denied that the protection afforded to her by the law against an unscrupulous husband is undoubtedly insufficient. She is always under the disadvantage that, whereas she is irrevocably bound, he is free to discard her whenever he pleases. Even, therefore, if she desires a divorce she must bring her husband into the humour to grant it, and if she dreads a divorce she must always be on her guard not to offend him. It is only in the very rare case of her being indifferent whether he divorces or not that she can venture to act quite independently.

The strength of a Mahommedan woman's position is that she has rights of her own, and whatever rights she has she can assert without legal impediment, just as if she were a single woman. The theory of the older Roman law and of English law that the wife during marriage has no independent legal existence, is unknown to the Mahommedan law. She can appear as a suitor in a court of justice against a stranger or against her own husband ; she can buy and sell, lend and borrow, give and take as she pleases : of course dealing only with her own property, and being liable for her own transactions. Her property is her own, and if she cannot enjoy it as she pleases, because of her husband's control

over her actions, she can, at any rate, keep him from it. In the case, therefore, of a rich wife and a needy husband the wife may obtain a position of almost complete independence.

A wife can also, as I have already pointed out, somewhat strengthen her position by the provisions inserted in the marriage contract. She can stipulate that her husband shall make her certain allowances, and grant her certain indulgences : and, as long as the marriage lasts, she can resort to the courts of law to compel him to perform his agreement. The dower may also be made use of to protect the wife against the exercise of the power of divorce. A very large amount of dower is not unfrequently named, much larger than would be suitable having regard to the circumstances and position in life of the parties, but which it is understood will only be enforced in case of a divorce. Of course this operates as a check upon the husband, but it is a clumsy contrivance. In the first place it goes too far, because it leaves the husband almost without any check at all upon the conduct of his wife ; and secondly, it is very difficult to prevent the wife claiming the whole of the dower promised, even if there is no divorce.

## CHAPTER VII

### GUARDIANSHIP

THERE are three kinds of guardians to an infant under the Mahommedan law—the natural guardian, the testamentary guardian, and the guardian appointed by the court.

The father is the natural guardian of his children. If he dies the father's *wasi*, if the father has appointed one, is the guardian. If the father has left no executor, the grandfather takes his place as natural guardian. If the grandfather is dead, then the guardianship falls upon his *wasi* if one has been appointed. If there be none of these persons to take the guardianship, then a guardian is appointed by the court from amongst the nearest male agnates.

The father can, however, make by his will any arrangement for the guardianship of his children which he thinks proper.

The mother has a right to the custody of her children during the age of nurture, but she is not their guardian.

The duties of the guardian relate to the custody of the minor, the charge of his maintenance and education, and the care of his property. These duties are sometimes assigned to different persons, but generally to one, except that the guardian, as just now mentioned, cannot remove a very young child from the custody of its mother.

The guardian is liable to be called upon at any time to account for any failure in the performance of his duties as guardian. This is done by an application to the court made by a friend on behalf of the infant; and if any

misconduct is shown the guardian is liable to be removed. When the infant comes of age the guardian is liable to account to the infant for the receipts and disbursements of the infant's money by him as guardian, for all property come to his hands as guardian, and for the faithful and prudent management of such property.

The powers of a guardian over the property of his ward are not very strictly defined by the Mahommedan law, but I have little doubt that many things which Mahommedan lawyers consider lawful would not be allowed in a British court. Thus some Mahommedan lawyers say that a father may pledge the property of his child to pay his own debts. This would certainly not be allowed. So all guardians are said to be allowed to invest the movable property of their wards in trade. I doubt if this would be permitted as a general rule : though it might under special circumstances. The guardian may, however, apply moneys in his hand for the proper maintenance and education of his ward, and may sell any movable property of the ward to procure money for that purpose.

With regard to the immovable property of the ward the rules of Mahommedan law are rather more stringent, but still allow more latitude to the guardian than our courts are accustomed to concede. The guardian, if appointed by will, may sell the immovable property if it is necessary to do so in order to carry out the provisions of the will, as, for example, if the testator has directed a sale, or if money is wanted to pay legacies. So also a guardian may sell immovable property to pay government revenue, or rent, or a debt, if there is danger that otherwise the land will be sold by process of law. In all these cases the power of sale may be said to be necessary, and to be properly conceded. But Mahommedan lawyers seem disposed to consider that a guardian



may proceed to a sale of immovable property whenever he considers that such a sale would be advantageous to the ward. But to allow a guardian to sell land or houses merely in order to make a better investment would be most dangerous, and I do not think our courts would sanction such a proceeding.

Nothing is said in the Mahommedan law-books about the power of Mahommedan guardians to grant leases of immovable property. But short leases, such as prudent owners are in the habit of granting, would, no doubt, be allowed.

## CHAPTER VIII

### PRE-EMPTION

THERE is under the Mahommedan law a right which may be shortly described as the right of a third person under certain circumstances to step in, when a contract is made for the sale of immovable property, and claim to take the place of the buyer, that is, to take the property at the same price and on the same conditions as the buyer and seller have agreed upon.

This right is called by us the right of Pre-emption : the corresponding Arabic term is *shoofa*.

It is doubtful whether the right of pre-emption is one that Mahommedans could claim as being reserved to them by the Regulation of Warren Hastings mentioned above<sup>1</sup>. But it has always been a well-established custom, and as such the courts would be fully justified in adopting it.

The right of pre-emption can only be exercised in regard to immovable property. For instance, it would not apply to a sale of crops or trees which were intended to be removed.

The rules to be observed in making the claim are very precise, and must be strictly observed. As soon as the claimant hears of the sale he must at once announce his intention of making the claim in the presence of witnesses. But this announcement is of no effect unless it is followed up by a formal claim in presence of the purchaser, or of the seller, or upon the premises in respect of which the claim is made. If the possession has been already trans-

<sup>1</sup> *Supra*, p. 7.

ferred to the purchaser it would be reasonable to require that the claim should be made in his presence, and this is said to be required.

The persons who are entitled to claim a right of pre-emption are—

1. Persons who are co-sharers with the seller and the seller is selling his share.

2. Persons who have some right over the property sold, or who own land over which the owner of the property has some right, or who are in some other way what are called 'participators of appendages'.<sup>1</sup>

3. Persons who own property contiguous to that which is sold.

In case of competition between these persons they have priority of claim in the order in which they are here enumerated.

There is some difference of opinion as to the extent to which the custom prevails in India. In Bengal it has been confined to cases where all three of the parties concerned are Mahommedans. But in the North-West of India the courts have declined to accept this view, and consider that the right exists whether the purchaser is a Mahommedan or not. But in the Madras Presidency the custom is said to be unknown.

The claim of pre-emption is acknowledged by Mahommedan lawyers to have some inconveniences: and we find a number of devices suggested for getting rid of the claim altogether. Some of these are sheer frauds, as, for example, the pretence that the property was sold for a sum of money far beyond its real value, which was not the real price. But Mahommedans of the present day do not suggest that such devices as these should be treated as valid.

But the claim may sometimes be defeated by the vendor

<sup>1</sup> Wilson, *Mahommedan Law*, p. 399.

reserving a narrow strip of the property sold, which would prevent the claimant's property being contiguous to that of the seller. There is no reason why this device should not be effectual.

So also the claim may be defeated by putting the purchaser himself into the position of having a prior claim, by making him in some sort a sharer in the property sold, as, for example, selling him the growing trees not for removal but to remain where they were.

#### WUKF

Mahommedans place under special protection the appropriation of property to pious purposes. They call such an appropriation *wukf*.

A *wukf* may be made for any purpose connected with the Mahommedan faith. This seems to include very much the same objects as we call 'religious and charitable', such, for example, as the encouragement of religion, the performance of religious functions, the relief of persons in poverty or any sort of distress, the encouragement of learning and education.

The subject of the *wukf* must belong to the appropriator at the time he appropriates it. An appropriation of property which he might afterwards acquire would be void. There must also be no uncertainty as to the thing appropriated: and the appropriation must be in perpetuity.

No appropriation can be made of such things as would be consumed by use, such as eatables and drinkables. It is said that money may be appropriated for the purpose of lending it out without interest to the poor. It could hardly be appropriated in order that it might be invested and the proceeds applied to the purposes of *wukf*, because though taking interest is now lawful, it could scarcely form part of a religious transaction. It

might perhaps be given in order to be laid out in the purchase of land to be itself appropriated.

The appropriator may reserve the thing, or any part thereof, or the profits thereof, for his own use during his life, and direct that after his death it shall be applied to the purposes indicated.

Property appropriated to pious purposes is managed by a person appointed for the purpose who is called a *mutwulli*. The person making the appropriation generally appoints the *mutwulli*, or directs how he is to be appointed. He may appoint himself to the office, or give directions how members of his family are to succeed each other in the appointment.

If no other mode of appointment has been ordained by the appropriator a *mutwulli* may appoint his successor.

The principal duty of the *mutwulli* is to preserve the property of the *wukf* intact and to appropriate the profits to the purposes indicated by the founder. He is bound by the ordinary rules of good management. He may let lands and houses at the usual rents and under the usual conditions. He cannot sell the land, except under the stress of urgent necessity, as where a sale of part of the property would save the remainder.

The manager can be removed by a court of law for misconduct.

During sickness, or by will, no more than one-third of a Mahommedan's property can be appropriated to religious purposes.

There has been a persistent attempt by Mahommedans to give to a mere appropriation of property to the endowment of a man's own family something of a religious character, and so to obtain the protection afforded by the law to what is really an appropriation to religious purposes. But such contrivances for evading the ordinary law have recently not been successful. Unless there is

a definite appropriation of a well-ascertained portion of the property within a reasonable time, the whole proceeding is void. Moreover, even where there is such an appropriation, it will not cover more of the property than is necessary to fulfil the purposes indicated.

## CHAPTER IX

### SHIAH LAW

THERE are several variations of the Shiah law from the Sunni law, which is that which has been described hitherto: of these I shall notice the more important.

The most important of all is that which occurs in the rules of inheritance. The Shiahs have any two classes of heirs, sharers and residuaries, including under these two classes—

1. Parents and descendants how low soever.
2. Grand-parents how high soever, and brothers and sisters of the *propositus*, and their descendants how low soever.
3. All other collateral relations.

The rule that a male takes as much as two females is applied to the sharers; and there is a further rule that those connected with the *propositus* through the father take twice as much as those whose connexion is through the mother.

The order of succession amongst the residuaries is that stated in the above enumeration of the heirs, the first class excluding the second, and the second the third.

The rule of the Sunni law which requires that the share of the husband or the wife should be deducted before ascertaining the share of the mother is not recognized by the Shiahs.

The mother's share of one-third is not reduced to one-sixth by the presence of two sisters; in order to make this reduction there must be either two brothers, or one brother and two sisters, or four sisters.

If there is a surplus after satisfying the sharers, it is not necessary that there should be no residuaries in order to make a case for a return. There will be a return in favour of the sharers who are parents or direct descendants as soon as the residuaries of the first class are exhausted. So there will be a return in favour of the grand-parents and brothers and sisters and their descendants who are sharers as soon as the residuaries of the second class are exhausted.

The shares are never reduced all round by what is called the 'increase'. If the shares of the sharers cannot all be satisfied, the loss falls upon the daughters.

By the Shiah law a temporary marriage, i. e. a marriage for a specified term, is allowed. This being so, all the legal consequences of a valid marriage must be allowed to follow upon it, except so far as they have been expressly excluded. A marriage of this kind gives no rights of inheritance as between the parties to it, but to deprive the wife and her children of such other rights as the marriage law gives them would not only be illegal but unjust.

A much more rational view of what constitutes a valid divorce is taken by the Shiah than by the Sunnis. The usual requirements of a valid legal act are required in this case also. A divorce pronounced by a person intoxicated or by a person acting under compulsion would be invalid: and the triple pronouncement must be made each in a different period of purity during which no intercourse has taken place.

The right of pre-emption is much narrower under Shiah law than under the Sunni law. The right, so far as it rests on vicinage, is not recognized at all: and the right of co-sharers is also somewhat restricted.



## APPENDIX

### EXAMPLES OF THE DISTRIBUTION OF THE ESTATE OF A DECEASED PERSON UNDER MAHOMMEDAN LAW

#### EXAMPLE I

A man dies leaving a widow, a mother, and two sons.

The widow takes a share of  $\frac{1}{8}$ .

The mother  $\frac{1}{8}$ .

Residue is  $\frac{17}{24}$ .

Each son takes  $\frac{1}{2}$  of  $\frac{17}{24}$ .

Ultimate division: widow,  $\frac{6}{48}$ ; mother,  $\frac{6}{48}$ ; each son,  $\frac{17}{48}$ .

#### EXAMPLE II

A man dies leaving two sons and two daughters and a widow.

Widow as sharer takes  $\frac{1}{8}$ .

The two daughters are excluded from a share by their brothers, but come in again as residuaries in right of their brothers taking  $\frac{1}{2}$  only of what the brothers take.

Residue is  $\frac{7}{8}$ .

This must be divided into six parts, two parts for each son and one part for each daughter.

Ultimate division: widow  $\frac{1}{8}$  or  $\frac{6}{48}$ ; each son  $\frac{2}{6}$  of  $\frac{7}{8}$  or  $\frac{14}{48}$ ; each daughter  $\frac{1}{6}$  of  $\frac{7}{8}$  or  $\frac{7}{48}$ .

#### EXAMPLE III

A man dies leaving a widow, a daughter, and two paternal uncles.

Widow as sharer takes  $\frac{1}{8}$ .

Daughter as sharer takes  $\frac{1}{2}$ .

Residue is  $\frac{3}{8}$ , which the two paternal uncles divide between them.

Ultimate division: widow  $\frac{1}{8}$  or  $\frac{2}{16}$ ; daughter  $\frac{6}{16}$ ; each uncle  $\frac{1}{2}$  of  $\frac{3}{8}$  or  $\frac{3}{16}$ .

#### EXAMPLE IV

A man dies leaving a widow, four sons of a brother, a uterine sister, and the son of an uncle.

The widow as sharer takes  $\frac{1}{4}$ .

The uterine sister as sharer takes  $\frac{1}{6}$ .

Residue is  $\frac{7}{12}$ .

The four sons of a brother as residuaries of the third class take in preference to the son of an uncle, who is of the fourth class.

Ultimate division: widow  $\frac{1}{4}$  or  $\frac{12}{48}$ ; uterine sister  $\frac{1}{6}$  or  $\frac{8}{48}$ ; each son of brother  $\frac{1}{4}$  of  $\frac{7}{12}$  or  $\frac{7}{48}$ .

#### EXAMPLE V

A man dies leaving three widows, six sons, and six daughters.

Three widows as sharers take  $\frac{1}{8}$ .

Residue is  $\frac{7}{8}$ .

The residue must be divided into eighteen parts, two for each son and one for each daughter.

Ultimate division: each widow  $\frac{1}{3}$  of  $\frac{1}{8}$  or  $\frac{6}{144}$ ; each son  $\frac{2}{18}$  of  $\frac{7}{8}$  or  $\frac{14}{144}$ ; each daughter  $\frac{1}{18}$  of  $\frac{7}{8}$  or  $\frac{7}{144}$ .

#### EXAMPLE VI\*

A man dies leaving two daughters of a son, daughter of son's son, son of son's son's son.

Two daughters of son take as sharers  $\frac{2}{3}$ .

Daughter of son's son is excluded from a share as  $\frac{2}{3}$  allotted to females is exhausted.

Residue is  $\frac{1}{3}$ .

The residue is divided between the son of the son's

son's son and the daughter of the son's son in the proportion of two to one.

Ultimate division : each daughter  $\frac{1}{2}$  of  $\frac{2}{3}$  or  $\frac{6}{18}$  ; son of son's son's son  $\frac{2}{3}$  of  $\frac{1}{3}$  or  $\frac{4}{18}$  ; daughter of son's son  $\frac{1}{3}$  of  $\frac{1}{3}$  or  $\frac{2}{18}$ .

## EXAMPLE VII\*

A man dies leaving two daughters, a son's daughter, a son's son's daughter, and a son's son's son's son.

The two daughters take as sharers  $\frac{2}{3}$ .

Residue is  $\frac{2}{3}$ .

This must be divided into four parts, two for the son's son's son's son, one for the son's daughter, and one for the son's son's daughter.

Ultimate division : each daughter  $\frac{4}{12}$  ; son's son's son's son  $\frac{2}{4}$  of  $\frac{1}{3}$  or  $\frac{2}{12}$  ; son's daughter  $\frac{1}{4}$  of  $\frac{1}{3}$  or  $\frac{1}{12}$  ; son's son's daughter  $\frac{1}{4}$  of  $\frac{1}{3}$  or  $\frac{1}{12}$ .

## EXAMPLE VIII

A woman dies leaving a husband, a daughter, and a paternal uncle.

The husband as sharer takes  $\frac{1}{4}$ .

The daughter as sharer takes  $\frac{1}{2}$ .

Residue is  $\frac{1}{4}$  which is taken by the paternal uncle.

Ultimate division : husband  $\frac{1}{4}$  ; daughter  $\frac{2}{4}$  ; uncle  $\frac{1}{4}$ .

## EXAMPLE IX

A woman dies leaving a husband, two daughters, and two sisters.

Husband takes as sharer  $\frac{1}{4}$ .

Daughters take as sharers  $\frac{2}{3}$ .

Residue is  $\frac{1}{12}$ .

\* Examples VI and VII are taken from Sir R. K. Wilson's *Digest of Anglo-Muhammedan Law*, sect. 227, where the rule applicable is fully explained.

Sisters take this as residuaries with the daughters.

Ultimate division: husband  $\frac{6}{24}$ ; each daughter  $\frac{6}{24}$ ; each sister  $\frac{1}{2}$  of  $\frac{1}{12}$  or  $\frac{1}{24}$ .

#### EXAMPLE X

A man dies leaving two widows, a mother, and three sons.

The two widows take as sharers  $\frac{1}{6}$  between them.

The mother takes as sharer  $\frac{1}{6}$ .

Residue is  $\frac{17}{24}$ , which is divided between the three sons.

Ultimate division: each widow  $\frac{9}{144}$ ; mother  $\frac{24}{144}$ ; each son  $\frac{34}{144}$ .

#### EXAMPLE XI

A man dies leaving a widow, a mother, and a sister.

The widow as sharer takes  $\frac{1}{4}$  or  $\frac{3}{12}$ .

The mother as sharer takes  $\frac{1}{3}$  or  $\frac{4}{12}$ .

The sister as sharer takes  $\frac{1}{2}$  or  $\frac{6}{12}$ .

$\frac{3}{12} + \frac{4}{12} + \frac{6}{12}$  make  $\frac{13}{12}$ .

The denominator must therefore be increased to 13, that is, the property must be divided into thirteen parts instead of twelve.

Ultimate division: widow  $\frac{3}{13}$ ; mother  $\frac{4}{13}$ ; sister  $\frac{6}{13}$ .

#### EXAMPLE XII

A man dies leaving a widow, a father, a mother, and two daughters.

Widow as sharer takes  $\frac{1}{8}$  or  $\frac{3}{24}$ .

Father as sharer takes  $\frac{1}{6}$  or  $\frac{4}{24}$ .

Mother as sharer takes  $\frac{1}{6}$  or  $\frac{4}{24}$ .

Two daughters as sharers take  $\frac{2}{3}$  or  $\frac{16}{24}$  between them.

$\frac{3}{24} + \frac{4}{24} + \frac{4}{24} + \frac{16}{24}$  make  $\frac{27}{24}$ .

The denominator must therefore be increased to

27, i.e. the property must be divided into twenty-seven parts instead of twenty-four.

Ultimate division: widow  $\frac{3}{27}$ ; father  $\frac{4}{27}$ ; mother  $\frac{4}{27}$ ; each daughter  $\frac{6}{27}$ .

## EXAMPLE XIII

A man dies leaving a widow, two daughters, and a paternal grandmother.

The widow takes a share of  $\frac{1}{8}$  or  $\frac{3}{24}$ .

The two daughters take a share of  $\frac{2}{3}$  or  $\frac{16}{24}$  between them.

The paternal grandmother takes a share of  $\frac{1}{6}$  or  $\frac{4}{24}$ .

$$\frac{3}{24} + \frac{16}{24} + \frac{4}{24} = \frac{23}{24}.$$

There is therefore a return of  $\frac{1}{24}$ , which will be divided between the two daughters and the grandmother in the proportion of their shares, i.e. four to one.

Two daughters take  $\frac{4}{5}$  of  $\frac{1}{24}$ .

Grandmother takes  $\frac{1}{5}$  of  $\frac{1}{24}$ .

Ultimate division: widow  $\frac{1}{8}$  or  $\frac{15}{120}$ ; each daughter  $\frac{1}{3} + \frac{2}{5}$  of  $\frac{1}{24}$  or  $\frac{42}{120}$ ; grandmother  $\frac{21}{120}$ .

## EXAMPLE XIV

A dies leaving a widow, a brother, a sister, the widow's mother, and the widow's brother. Before distribution the widow dies. On the distribution of A's property:

The widow of A gets a share of  $\frac{1}{4}$ .

A's sister is excluded from a share by her brother.

The widow's mother and the widow's brother are not entitled to anything.

Residue is  $\frac{3}{4}$  which is divided between A's brother and sister in the proportion of two to one.

Ultimate division of A's property: widow of A  $\frac{1}{4}$ ; brother of A  $\frac{2}{3}$  of  $\frac{3}{4}$  or  $\frac{2}{4}$ ; sister of A  $\frac{1}{3}$  of  $\frac{3}{4}$  or  $\frac{1}{4}$ .

On the second distribution :

The relatives of *A*'s widow are husband's brother, husband's sister, her own mother and brother.

The husband's brother and husband's sister are not entitled to anything out of the property of *A*'s widow.

The widow's mother gets a share of  $\frac{1}{3}$  of widow's  $\frac{1}{4}$ .

Brother as residuary gets  $\frac{2}{3}$  of widow's  $\frac{1}{4}$ .

Ultimate division : brother of *A*  $\frac{6}{12}$  ; sister of *A*  $\frac{3}{12}$  ; mother of *A*'s widow  $\frac{1}{12}$  ; brother of *A*'s widow  $\frac{2}{12}$ .

#### EXAMPLE XV

*A* dies leaving three sons and a daughter. Before distribution one son dies leaving a widow, two brothers, and a sister.

There are no sharers on the first distribution.

The property is divided into seven parts, of which each son takes  $\frac{2}{7}$  and the daughter  $\frac{1}{7}$ .

On the second distribution the share of the deceased son, which is  $\frac{2}{7}$ , is to be divided between *his* widow, *his* two brothers (sons of *A*) and *his* sister (daughter of *A*).

Widow of deceased son of *A* takes a share of  $\frac{1}{4}$  of  $\frac{2}{7}$ .

Daughter of *A* is excluded by her brothers (sons of *A*).

The residue, which is  $\frac{3}{4}$  of  $\frac{2}{7}$ , is divided between the sons of *A* and the daughter of *A*.

Sons of *A* take  $\frac{4}{5}$  of  $\frac{3}{4}$  of  $\frac{2}{7}$  or  $\frac{24}{140}$ .

Daughter of *A* takes  $\frac{1}{5}$  of  $\frac{3}{4}$  of  $\frac{2}{7}$  or  $\frac{6}{140}$ .

Ultimate division : widow of deceased son of *A*  $\frac{10}{140}$  ; each surviving son of *A*  $\frac{2}{7} + \frac{12}{140}$  or  $\frac{52}{140}$  ; daughter of *A*  $\frac{1}{7} + \frac{6}{140}$  or  $\frac{26}{140}$ .

## EXAMPLE XVI

A woman dies leaving a sister, her father's mother, her mother's mother, and her husband.

The husband takes a share of  $\frac{1}{4}$ .

The father's mother and mother's mother (both true grandmothers) take a share of  $\frac{1}{6}$  between them.

The sister takes a share of  $\frac{1}{2}$ .

Residue is  $\frac{1}{12}$ , and as there are no residuaries this is divided between the grandmothers and the sister in proportion to their shares.

Sister by the return takes  $\frac{2}{3}$  of  $\frac{1}{12}$ .

Grandmothers by the return take  $\frac{1}{3}$  of  $\frac{1}{12}$  between them.

Ultimate division: husband  $\frac{18}{72}$ ; sister  $\frac{1}{2} + \frac{2}{3}$  of  $\frac{1}{12}$  or  $\frac{40}{72}$ ; each grandmother  $\frac{7}{72}$ .

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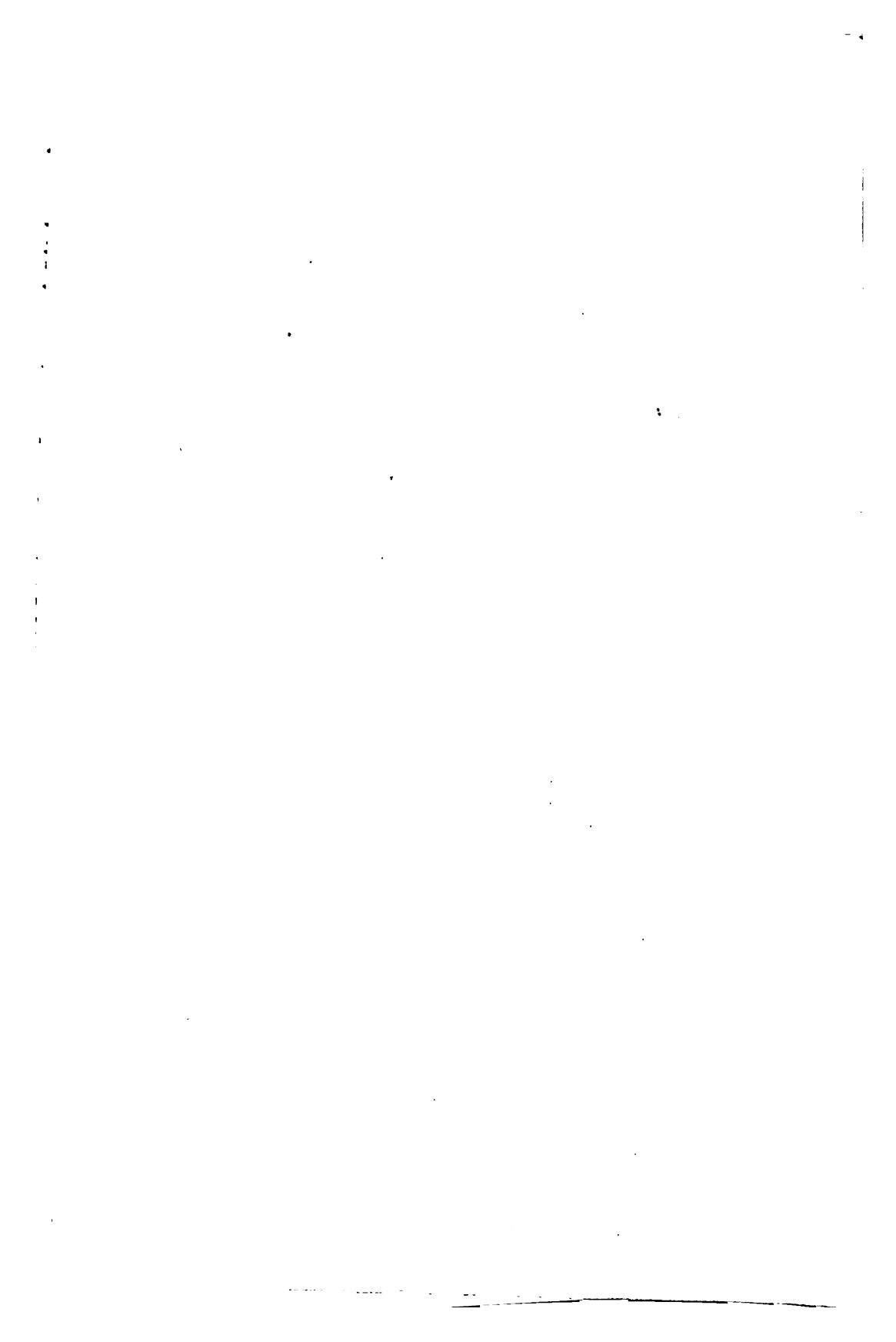
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